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Supreme Court of the United States

JUAN DEREYES, FRANK JACOBY
and MICHAEL FENNER,

Petitioners,

v.

SHAUN WILKINS and ROY BUCHNER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Is a section 1983 Fourth Amendment unlawful detention claim governed by the tort of malicious prosecution?

(2) Where a section 1983 Fourth Amendment "malicious prosecution" claim is based on unlawful detention pursuant to an arrest warrant, is there a favorable termination requirement?

(3) Does this Court's accrual decision in *Wallace v. Kato*, 127 S. Ct. 1091 (2007), apply to a section 1983 Fourth Amendment "malicious prosecution" claim based on unlawful detention pursuant to an arrest warrant?

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CITATIONS FOR OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit (Appendices A-B) is reported at *Wilkins v. DeReyes*, 528 F.3d 790 (10th Cir. 2008). The Tenth Circuit ultimately affirmed the August 16, 2006 decision of the United States District Court for the District of New Mexico, as amended by the February 13, 2008 supplemental opinion and partial summary judgment of the United States District Court for the District of New Mexico on limited remand (Appendices C-F). The opinions of the United States District Court for the District of New Mexico were not reported. The September 19, 2008 order of the United States Court of Appeals for the Tenth Circuit denying rehearing en banc (Appendix G) was not reported. On September 29, 2008, the United States Court of Appeals for the Tenth Circuit entered an order staying the issuance of the mandate for ninety (90) days. The September 29, 2008 order was not reported.

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 13, 2008. The Tenth Circuit denied a timely petition for rehearing en banc on September 19, 2008. This petition for writ of certiorari is filed within ninety (90) days of the denial of rehearing pursuant to Supreme Court Rule 13(3). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the Plaintiffs/Respondents pursuant to 42 U.S.C. §1983, which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Plaintiffs/Respondents allege that the Defendants/Petitioners violated their rights under the Fourth and Fourteenth Amendments to the United States Constitution, the relevant parts of which read as follows:

***Fourth Amendment*:**

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

***Fourteenth Amendment*:**

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This section 1983 Fourth Amendment "malicious prosecution" case originated in the United States District Court for the District of New Mexico. Jurisdiction was invoked pursuant to 28 U.S.C. sections 1331 and 1343(3), as the suit involves federal questions under 42 U.S.C. section 1983.

The case arises out of the arrest and prosecution of Plaintiffs Shaun Wilkins and Roy Buchner, two members of Albuquerque's 18th Street Gang, for the murders of fellow gang member Ben Anaya, Anaya's girlfriend, Cassandra Sedillo, and her two boys, Matthew and Johnny Garcia, ages two and three. The murders occurred between December 12 and 18, 1995 at a cabin in the wilderness outside of Torreon, New Mexico. Anaya and Sedillo were shot to death execution style while they slept. The children were locked in the cabin with the dead adults and later died of starvation and dehydration. The bodies were discovered in April of 1996 by Ben Anaya's father, who owned the cabin. App. F:63-64.

Defendants Sgt. Frank Jacoby and Capt. Michael Fenner of the New Mexico State Police, together with Defendant Det. Juan DeReyes of the Albuquerque Police Department, investigated the murders. In May of 1996, they obtained a series of tape recorded statements from Shawn Popeleski and Lawrence Nieto, fellow gang members, both of whom were subsequently convicted of involvement in these murders and one of whom is still serving time. These statements implicated Plaintiffs in the murders. App. F:64-68.

The statements obtained from Popeleski and Nieto, who were present at the cabin when the murders occurred, were consistent. They were also corroborated by investigative polygraphs of Popeleski, Nieto and Wilkins, which established Wilkins as the

trigger man and Buchner as an accomplice.[1] App. F:64-67; 129-131.

Representatives from the district attorney's office witnessed several of the interviews and were advised of the outcomes of interviews which they did not witness. When they believed probable cause existed to arrest Wilkins and Buchner, they so advised Defendants. The district attorney made the decision to charge Wilkins and Buchner with the murders. App. F:121; 134-136.

Arrest warrants were then sought by Defendants for Plaintiffs' arrests. The arrest warrant applications were reviewed and approved by the district attorney's office before they were submitted to a magistrate. The magistrate issued the arrest warrants and Plaintiffs were thereafter arrested pursuant to the warrants on May 11, 1996 (Wilkins) and May 13, 1996 (Buchner). App. F:67-68; 134-136.

Plaintiffs were brought before the magistrate who conducted separate probable cause hearings on May 24, 1996 (Buchner) and July 29, 1996 (Wilkins). Popeleski testified in person and was subject to cross-examination by Plaintiffs' criminal defense attorneys. Nieto refused to testify and his statement was testified to as a declaration against interest by New Mexico State Police Officer Eric Lucero, who had

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[1] Buchner's own polygraph, taken secretly while he was a pretrial detainee awaiting trial and subsequently discovered in this suit, corroborates the statements and Buchner's presence and participation in the murders. App. F:85-91.

obtained the last tape recorded statement of Nieto. Officer Lucero was also subject to cross-examination. At the conclusion of both probable cause hearings, the magistrate found probable cause and bound Plaintiffs over for trial in state district court. They remained in custody. App. F:63-68.

Despite the statements of Popeleski and Nieto, the juries in Plaintiffs' criminal trials could not reach verdicts. Mistrials were declared on October 9, 1997 (Wilkins) and November 11, 1997 (Buchner), and retrials were planned. However, on January 3, 2001 (Buchner) and March 2, 2001 (Wilkins), a new district attorney *nolle prossed* both cases without prejudice, reserving the right to retry Wilkins and Buchner. App. F:67-69.

Plaintiffs then filed suit on August 8, 2002, claiming innocence and seeking damages under 42 U.S.C. section 1983. The underpinnings of their section 1983 claims were, first, that the statements obtained from Popeleski and Nieto were deliberately coerced because Plaintiff Wilkins had been involved in a drive-by shooting of Defendant DeReyes' home and, second, that the Defendants knowingly used these coerced statements to obtain arrest warrants against Plaintiffs. Count I of their Complaint alleged that Defendants coerced the statements from Popeleski and Nieto and used them against Plaintiffs in violation of their substantive due process rights. Count II alleged that Defendants "maliciously prosecuted" Plaintiffs in violation of their Fourth Amendment rights through the institution of wrongful legal process, the arrest warrants, that resulted in Plaintiffs' unlawful detention. The factual basis for Count

II was the same as for Count I: the statements of Nieto and Popeleski were coerced and, consequently, probable cause was lacking for the arrest warrants and the subsequent prosecutions for murder.[2] App. F:69-70.

Defendants moved for summary judgment in March of 2004, and raised, among other issues, New Mexico's three-year statute of limitations and qualified immunity. Defendants' statute of limitations argument was quite simple at the time. The crux of Plaintiffs' section 1983 substantive due process (Count I) and section 1983 Fourth Amendment "malicious prosecution" (Count II) claims was that statements were coerced from third parties, Nieto and Popeleski, and unconstitutionally used against Plaintiffs in obtaining arrest warrants and prosecuting them for murder. In Defendants' view, there was no dispute as to when Plaintiffs became aware of these statements and the circumstances under which the statements were taken because they were videotaped and Plaintiffs filed admissibility motions in their criminal cases about them on April 14, 1997 (Buchner) and June 30, 1999 (Wilkins).[3] Thus, under the federal discovery accrual rule, *United States v. Kubrick*, 444 U.S. 111 (1979), their section 1983

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[2] There was also a Count III alleging a section 1983 conspiracy premised on Counts I and II. App. F:70.

[3] The motion in Plaintiff Wilkins' criminal case was filed after his first trial but before his planned retrial, although Defendants believe he was aware of these statements much earlier. App. F:71.

claims accrued at those times. However, inasmuch as they did not file their Complaint within three years of the date they became aware of the allegedly coerced statements, their section 1983 claims were time-barred. App. F:58-59; 70-71.

Disagreeing, the district court ruled in August, 2006, that *Heck v. Humphrey*, 512 U.S. 477 (1994), had prevented accrual of Plaintiffs' section 1983 claims until the charges against them were *nolle prossed* without prejudice, even though Plaintiffs were never convicted of anything. Specifically, the district court, relying on Tenth Circuit precedent, determined that *Heck v. Humphrey* applied to the possibility of future conviction. Thus, Plaintiffs' section 1983 claims were not time-barred under the applicable three-year limitations period. *Wilkins v. DeReyes*, United States District Court for the District of New Mexico, Case No. 02cv980 JH/RLP (Slip Op. August 16, 2006, pp. 10-16). App. F:70-78.

The district court also denied Defendants' motion for summary judgment based on qualified immunity, finding that Plaintiffs had produced sufficient evidence to create genuine issues of material fact as to the coercion of Popeleski and Nieto in violation of substantive due process under *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997). *Clanton* had held that it was clearly established law as of 1993 that a person could assert a substantive due process claim under the Fourteenth Amendment arising out of the coercion of a third party that produced a statement falsely implicating that person in a crime. *Clanton*,

129 F.3d at 1157-59; *Wilkins*, Case No. 02cv980 JH/RLP (Slip Op., pp. 27-43). App. F:93-118.

Because the district court found there were genuine issues of material fact as to the coercion of Popeleski's and Nieto's statements with respect to Plaintiffs' section 1983 substantive due process claim, it likewise concluded that Defendants were not entitled to qualified immunity with respect to Plaintiffs' section 1983 Fourth Amendment "malicious prosecution" claim. The district court relied on *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004), for the elements of a section 1983 "malicious prosecution" claim, including the lack of probable cause, malice and favorable termination of the charges. For purposes of summary judgment, according to the district court, Plaintiffs satisfied these elements. *Wilkins*, Case No. 02cv980 JH/RLP (Slip Op., pp. 45-55). App. F:118-132.

Defendants timely appealed the denial of qualified immunity pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). While the appeal was pending, this Court decided *Wallace v. Kato*, 127 S. Ct. 1091 (2007). Defendants raised *Wallace* in their reply brief, arguing that because Plaintiffs' suit was time-barred under *Wallace*, they did not state a cause of action, the first step in the qualified immunity analysis. They alternatively asked the Tenth Circuit to exercise pendent appellate jurisdiction on this issue because of its dispositive effect on all of Plaintiffs' section 1983 claims. They also specifically questioned the applicability of a favorable termination requirement to Plaintiffs' section 1983 Fourth Amendment "malicious

prosecution" claim. Following oral argument on Defendants' appeal, including consideration of *Wallace*, the Tenth Circuit remanded the matter to the district court to consider the effect of *Wallace*. App. E:56-57.

The district court on remand held that Count I of Plaintiffs' Complaint, which alleged a violation of Plaintiff's substantive due process rights, was barred by the statute of limitations under *Wallace* because Plaintiffs had not filed suit within three years of their awareness of the allegedly coerced statements. The district court acknowledged that *Wallace* had expressly held that *Heck v. Humphrey* only applied where there was an existing conviction and that, consequently, it did not apply here because Plaintiffs had not been convicted. However, as to Count II alleging section 1983 Fourth Amendment "malicious prosecution," the district court, explaining that it was following *Wallace*, held the claim was timely because it accrued on the dates the criminal charges against the Plaintiffs were *nolle prossed* by the district attorney, not the dates Plaintiffs became aware of the coerced statements used against them. The district court found the *nolle prosses* were terminations in Plaintiffs' favor for section 1983 "malicious prosecution" purposes, making such claims "present and complete" no earlier than at those times. The matter was then sent back to the Tenth Circuit pursuant to the limited order of remand. *Wilkins v. DeReyes*, Case No. 02cv980 JH/RLP (Slip Op., February 13, 2008). App. C:36-53; App. D:54-55.

The Tenth Circuit affirmed the district court in the case now before this Court. *Wilkins v. DeReyes*, 528 F.3d 790 (10th Cir. 2008). Addressing Plaintiffs' section 1983 Fourth Amendment "malicious prosecution" claim in particular, Judge Tymkovich, writing for the panel, ruled that such a Fourth Amendment claim is governed by the general common law of malicious prosecution, as set out in the Restatement (Second) of Torts sec. 659(c) (1977), which requires favorable termination, malice and the absence of probable cause. *Wilkins*, 528 F.3d at 796-804. According to the Tenth Circuit, the district court had correctly ruled that Plaintiffs' section 1983 Fourth Amendment "malicious prosecution" claim accrued when the charges against them were *nolle prossed*, which constituted the requisite favorable termination under the Restatement (Second) of Torts. The panel thus implicitly rejected the Defendants' argument that under *Wallace*, Plaintiffs' section 1983 Fourth Amendment "malicious prosecution" claim was time-barred because it was not subject to a favorable termination requirement and that it accrued either when Plaintiffs were arrested pursuant to the arrest warrants or later when they were bound over for trial. Finally, the Tenth Circuit concluded that Plaintiffs had presented enough evidence to create genuine issues of material fact to satisfy the requirements for their section 1983 Fourth Amendment "malicious prosecution" claim. *Id.* at 799-804. App. A:1-34; App. B:35.

The Tenth Circuit was untroubled by the contrary reasoning of a different Tenth Circuit panel

which declared that procedural due process, and *not* the Fourth Amendment, governs the wrongful institution of legal process.[4] The Tenth Circuit was also untroubled with its position, again contrary to that of the other Tenth Circuit panel, that there could theoretically be two separate section 1983 Fourth Amendment claims for unlawful seizure arising, one after the other, from closely related events: the first arising from a warrantless arrest of a plaintiff without probable cause (false arrest/imprisonment) and the second arising shortly thereafter from the binding over or arraignment of a plaintiff without probable cause (wrongful institution of legal process). It explained: "[B]ecause the institution of legal process separates the two claims – and thus makes them legally distinct – we think the two claims, though

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[4] The panel decision in this case is inconsistent with a Tenth Circuit opinion handed down three months earlier in *Mondragon v. Thompson*, 519 F.3d 1078 (10th Cir. 2008), where Judge McConnell, writing for a different panel, had ruled that a claim premised on the wrongful institution of legal process was a Fourteenth Amendment procedural due process claim, *not* a Fourth Amendment claim. He stated: "If [one] has been imprisoned pursuant to legal but wrongful process, he has a claim under the procedural component of the Fourteenth Amendment's Due Process Clause analogous to a tort claim for malicious prosecution." *Id.* at 1082. Judge McConnell also questioned whether one section 1983 Fourth Amendment claim could so closely follow another. *Id.* at 1083 n. 4. Defendants timely called *Mondragon* to the attention of the Tenth Circuit panel.

In this case, Plaintiffs have expressly disclaimed reliance on procedural due process.

grounded in the same constitutional provision, can coexist."[5] App. A:14-19.

Defendants petitioned for rehearing en banc, arguing that the Tenth Circuit should reconsider the elements of a section 1983 Fourth Amendment "malicious prosecution" claim, including not only the favorable termination requirement but the very existence of such a claim, as well as the intertwined accrual issues raised by *Wallace v. Kato*. They also asked the Tenth Circuit to resolve the intra-circuit split between it and the panel decision written by Judge McConnell in *Mondragon v. Thompson*, 519 F.3d 1078 (10th Cir. 2008).[6]

On September 19, 2008, the Tenth Circuit Court of Appeals denied rehearing en banc, nine to four, with Chief Judge Henry, and Judges McConnell, Lucero and O'Brien, voting for rehearing. App. G:140-141.

REASONS FOR ALLOWANCE OF THE WRIT

The Court should grant this writ for several reasons. First, the Tenth Circuit's decision conflicts with decisions of other circuits as to the elements of a section 1983 "malicious prosecution" claim. Second, the Tenth Circuit's decision conflicts with this Court's section 1983 Fourth Amendment accrual decision in

[5] *See Wilkins*, 528 F.3d at 799 n. 5.

[6] *See* n. 4, *supra*.

Wallace v. Kato, 127 S. Ct. 1091 (2007). Finally, the question of the nature of a section 1983 "malicious prosecution" claim – indeed its very existence – raises important issues nationwide that are long overdue for resolution by this Court.

I. The Tenth Circuit's Decision Conflicts with Decisions of Other Circuits as to the Elements of a section 1983 "Malicious Prosecution" Claim.

The Tenth Circuit in this case applied *both* a Fourth Amendment analysis to the Plaintiffs' "malicious prosecution" claim *and* a common law malicious prosecution analysis. After engaging in Fourth Amendment analysis and concluding that Plaintiffs indeed stated a section 1983 Fourth Amendment claim based on their unlawful detention pursuant to the wrongful institution of legal process (the arrest warrants), the Tenth Circuit went on to effectively hold, affirming the district court, that Plaintiffs' claim did not accrue until criminal proceedings were terminated in their favor. App. A:10-31. In so doing, the Tenth Circuit explicitly applied the favorable termination requirement of the tort of malicious prosecution, based on the Restatement (Second) of Torts sec. 659(c) (1977) and *not* New Mexico law, to Plaintiffs' section 1983 Fourth Amendment claim. *Id. See also Frantz v. Village of Bradford*, 245 F.3d 869, 874-75 (6th Cir. 2001), abrogation in part recognized on other grounds, *Thacker v. City of Columbus*, 328 F.3d 244, 258-59 (6th Cir. 2003), where the Sixth Circuit declared: "We

unanimously reject the reasoning of courts which have relied on the state law elements of malicious prosecution. We hold that establishing a § 1983 cause of action requires a constitutional violation and cannot differ depending on the tort law of a particular state."

However, the Tenth Circuit's decision (like that of the Sixth Circuit) conflicts in this respect with *Boyd v. City of New York*, 336 F.3d 72, 75 (2d Cir. 2003) (citation omitted; emphasis added), where the Second Circuit declared: "The elements of false arrest and malicious prosecution under § 1983 are 'substantially the same' as the elements *under New York law*. Therefore, the analysis of the state and federal claims is identical. The pivotal issue in the present case is the presence, or absence, of probable cause for both the arrest and subsequent prosecution of [plaintiff]." *See also Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001), where the First Circuit, with respect to a section 1983 "malicious prosecution" claim, cited a Massachusetts Supreme Judicial Court decision for the malicious prosecution elements of such a claim.

Furthermore, the Tenth Circuit applied the malice requirement of the tort of malicious prosecution to Plaintiffs' claim. App. A:12-22. *See also Poppell v. City of San Diego*, 149 F.3d 951 (9th Cir. 1998) and *Awabdy v. City of Adelanto*, 368 F.3d 1062 (9th Cir. 2004), where the Ninth Circuit applied a malice requirement to the respective plaintiffs' section 1983 "malicious prosecution" claims. But this conflicts with the Fourth Circuit in *Lambert v. Williams*, 223 F.3d 257, 262 n. 2 (4th Cir. 2000), which held that there is

no malice requirement for a section 1983 Fourth Amendment "malicious prosecution" claim because the reasonableness of a seizure should be judged from an objective perspective. Imposing a malice requirement also conflicts with the observation of the Third Circuit in *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 n. 6 (3d Cir. 1998), that an objective standard should apply.

Moreover, there are significant differences in approach in the circuits as to the very nature of a section 1983 "malicious prosecution" claim. The Fifth Circuit en banc described the situation this way in December, 2003:

> Our sister circuits take two broad approaches to malicious prosecution under § 1983. The first is to require proof of all common law elements of malicious prosecution, usually based on the law of the state where the offense occurred, as well as proof of a constitutional violation – an approach adopted in various forms by the First, Second, Third, Ninth and Tenth Circuits. The second approach views malicious prosecution as unenforceable under § 1983, looking to the common law elements of the tort only as needed to assist the enforcement of analogous constitutional violations – seizures under the Fourth Amendment, for example. This is the view of the Fourth, Seventh and Eleventh Circuits.

Castellano v. Fragozo, 352 F.3d 939, 949 (5th Cir. 2003) (en banc) (citations omitted).[7]

In addition to these conflicts in the circuits, there is the previously noted intra-circuit split in the Tenth Circuit as to whether a section 1983 "malicious prosecution" claim based on unlawful detention pursuant to legal process is governed by the Fourth Amendment or procedural due process.[8] App. A:14-19.

Unfortunately, these conflicts and the resulting confusion about section 1983 malicious prosecution claims are nothing new. Almost fifteen years ago, this Court acknowledged what it then called "the embarrassing diversity of judicial opinion" on the issue. *Albright v. Oliver*, 510 U.S. 266, 270 n. 4 (1994). More recently, in *Wallace v. Kato*, 127 S. Ct. 1091, 1096 n. 2 (2007), this Court observed: "We have never explored

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[7] A somewhat different view of the approaches in the circuits is suggested in J. Goldstein, *Note: From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 Colum. L. Rev. 643, 654 (2006) (footnotes omitted): "The First, Second, and Eleventh Circuits compose [sic] the 'Tort Circuits,' wherein plaintiffs pleading malicious prosecution claims under § 1983 must satisfy the common law elements of the claim in addition to proving a constitutional violation. The 'Constitutional Circuits' – the Fourth, Fifth, Seventh, and Tenth – concentrate on whether a constitutional violation exists." The author goes on to describe the Third and Sixth Circuits' approaches as unclear, while the Ninth Circuit "lies on both sides of the divide. . . . " *Id.* at 655. *See also* J. Schillaci, *Note: Unexamined Premises: Toward Doctrinal Purity in § 1983 Malicious Prosecution Doctrine*, 97 Nw. U. L. Rev. 439 (2002).

[8] *See* Statement of the Case and n. 4, *supra*.

the contours of a Fourth Amendment malicious-prosecution suit under § 1983, and we do not do so here." (citation omitted). The only aspect of section 1983 "malicious prosecution" law that has been clarified by this Court is its ruling in *Albright v. Oliver* that there is no due process right to be free from criminal prosecution without probable cause because it is the Fourth Amendment that applies to pretrial seizures resulting in deprivations of liberty. After *Albright v. Oliver*, all we know for sure is that a section 1983 "malicious prosecution" claim may not be based on substantive due process.

Defendants submit that this case provides an appropriate vehicle to reduce much of the confusion in the circuits: this Court should altogether eliminate the elements of the tort of malicious prosecution from section 1983 damages claims based on Fourth Amendment violations except where such a claim challenges an existing conviction and the case is therefore controlled, *by analogy only*, to malicious prosecution pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994). As the Seventh Circuit, in an opinion by Judge Easterbrook, soundly observed, "Relabeling a fourth amendment claim as 'malicious prosecution' would not extend the statute of limitations . . . , and if a plaintiff can establish a violation of the fourth (or any other) amendment, there is nothing but confusion to be gained by calling the legal theory 'malicious prosecution.'" *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001).

Defendants agree. They maintain that there is simply no basis in the language of section 1983, its legislative history or the precedents of this Court interpreting section 1983 and the Fourth Amendment to apply a favorable termination requirement to a section 1983 Fourth Amendment claim where there is no challenged conviction. That is also true for the common law malice requirement, regardless of whether there is a conviction. *See Parratt v. Taylor*, 451 U.S. 527 (1981), overruled in part on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986), which held as a matter of section 1983 interpretation that there is no state of mind requirement for the prima facie case. Section 1983 is not a tort statute: it refers explicitly to "rights, privileges, or immunities secured by the Constitution and [federal] laws." The "background of tort liability" language of *Monroe v. Pape*, 365 U.S. 167 (1961), overruled in part on other grounds, *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978), addresses the absence of a specific intent requirement for the prima facie section 1983 case and this Court's approach to individual immunities. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity for prosecutors determined in part by their common law immunity in 1871) and *Pierson v. Ray*, 386 U.S. 547 (1967) (qualified immunity for police officers determined in part by their common law immunity in 1871).

It is true that tort law can inform section 1983 interpretation, *e.g., Malley v. Briggs*, 475 U.S. 335 (1986) (proximate cause), *Carey v. Piphus*, 435 U.S. 247 (1978) (damages) and individual immunity issues.

But this Court has never held that tort law determines the scope of section 1983. To the contrary: this Court has emphasized that section 1983 and the Fourteenth Amendment must not become a "font of tort law." *See Paul v. Davis*, 424 U.S. 693, 701 (1976) (section 1983 case in which Court rejected "a reading [that] would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states"); *Parratt v. Taylor, supra*; *Zinermon v. Burch*, 494 U.S. 113, 139-51 (1990) (Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, dissenting). Consequently, grafting the elements of the tort of malicious prosecution onto a section 1983 Fourth Amendment claim, as the Tenth Circuit did here, is unwarranted where there is no conviction that is challenged by such a claim and thus no intersection of section 1983 and habeas corpus. The Tenth Circuit improperly made the tort of malicious prosecution actionable under section 1983.

Accordingly, this Court should grant certiorari to resolve these circuit conflicts and clear up the confusion caused by section 1983 Fourth Amendment "malicious prosecution" claims.

II. The Tenth Circuit's Decision Conflicts with This Court's Fourth Amendment Accrual Decision in *Wallace v. Kato*, 127 S. Ct. 1091 (2007).

In *Wallace v. Kato*, this Court ruled that where the plaintiff alleged that a warrantless arrest, made

without probable cause, led to his confession, conviction (later overturned) and imprisonment in violation of his Fourth Amendment rights,[9] his section 1983 cause of action for unlawful detention accrued no later than the point at which he was bound over by a magistrate or arraigned on criminal charges or, in other words, when he was detained pursuant to legal process. This Court determined that the plaintiff's Fourth Amendment false arrest/imprisonment claim was time-barred because the point at which he was detained pursuant to legal process was outside of the applicable limitations period. This Court thus rejected the plaintiff's argument that his Fourth Amendment unreasonable seizure claim accrued only when his conviction was overturned by the state courts.

Wallace emphasized that the basis of a section 1983 unlawful seizure claim, whether premised on unlawful detention without legal process or unlawful detention pursuant to wrongful institution of legal process, is the Fourth Amendment. The basis of such a claim cannot be substantive due process after *Albright v. Oliver*. Moreover, *Wallace* instructed that the point at which *any* section 1983 cause of action accrues is when there is a present and complete cause of action. This *Wallace* inquiry should have been made and resolved in favor of the Defendants in this

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[9] *Wallace* involved a section 1983 false arrest/imprisonment claim, and *not* a section 1983 "malicious prosecution" claim. *Wallace v. Kato*, 127 S. Ct. at 1094-97.

case because the Plaintiffs' Fourth Amendment unlawful seizure claim was complete when the Plaintiffs were unlawfully detained pursuant to the alleged wrongful institution of legal process, namely, the arrest warrants, even though the detention continued throughout the prosecution of Plaintiffs.

This conclusion is not altered by the fact that the extent of the damages for unlawful detention pursuant to wrongful institution of legal process was not known at the time that Plaintiffs were detained pursuant to arrest warrants and throughout their subsequent prosecution. As this Court explained in *Wallace*, 127 S. Ct. at 1097:

> Even assuming . . . that all damages for detention pursuant to legal process could be regarded as consequential damages attributable to the unlawful arrest, that would not alter the commencement date for the statute of limitations. . . . Were it otherwise, a statute would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed statute of repose in the sole hands of the party seeking relief.

The same is true here: the alleged Fourth Amendment violation was complete at the time of the unlawful detention pursuant to wrongful institution of legal process, the arrest warrants, even though the

damages continued after that point because of the subsequent detention and prosecution.[10]

However, the Tenth Circuit improperly engaged in an end-run around *Wallace* by relying on Plaintiffs' characterization of their section 1983 Fourth Amendment claim as a section 1983 "malicious prosecution" claim. The Tenth Circuit, following its section 1983 "malicious prosecution" precedents, held that Plaintiffs' Fourth Amendment claim accrued when the criminal charges against them were *nolle prossed* in 2001, thereby extending the applicable statute of limitations for a section 1983 Fourth Amendment unlawful detention claim.[11] This was done over Defendants' strenuous objection that (1) *Wallace* required otherwise and (2) the Tenth Circuit had mischaracterized *Heck v. Humphrey*, 512 U.S. 477 (1994), as a section 1983 "malicious prosecution" case. App. A:10-18; 26-31; App. C:36-53. Rather, *Heck* involved a section 1983 damages action that challenged

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[10] Thus, the detention of Plaintiffs should not be characterized as a "continuing seizure" that automatically extends the statute of limitations. *Cf. Albright v. Oliver*, 510 U.S. at 816-17 (Ginsburg, J., concurring). The continuing effects of a prior constitutional violation do not, in and of themselves, constitute a continuing violation that extends a statute of limitations under *United Airlines v. Evans*, 431 U.S. 553 (1977). *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (rejecting "related acts" approach to continuing violation doctrine); *Ledbetter v. Good Year Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007) (interpreting Title VII's "unlawful employment practice language").

[11] This is precisely what Judge Easterbrook, writing for the Seventh Circuit, warned against in *Newsome v. McCabe*, *supra*.

an existing conviction, thereby placing it at the intersection of section 1983 and habeas corpus, unlike this case. In *Heck*, the tort of malicious prosecution was used by this Court only *by analogy* in order to determine the time of accrual of such a section 1983 damages action, regardless of its constitutional basis.

In summary, Plaintiffs' Fourth Amendment unlawful seizure claim is based on Plaintiffs' allegedly unlawful detention pursuant to legal process when they were arrested and seized under arrest warrants wrongfully obtained by the Defendants with information coerced from third parties (Nieto and Popeleski). Their seizures were therefore complete at that point even though their detentions continued throughout their prosecutions. Alternatively, their Fourth Amendment unlawful seizure claim is based on their allegedly unlawful detention pursuant to legal process when they were bound over after separate preliminary hearings held in 1996. Their seizures were therefore complete at that time. In either case – and this is Defendants' point – *Wallace* dictates that their Fourth Amendment unlawful seizure claim, based as it is on the wrongful institution of legal process, is time-barred because the claim in both instances accrued at times which were outside of New Mexico's three-year limitations period.

Accordingly, this Court should grant certiorari to resolve the conflict between *Wallace v. Kato* and the Tenth Circuit's decision in this case.

III. The Question of the Nature of a section 1983 "Malicious Prosecution" Claim – Indeed Its Very Existence – Raises Important Issues Nationwide that Should Be Resolved Now.

This case merits review because of (1) the conflict in the circuits and (2) the conflict between the Tenth Circuit's decision and this Court's decision in *Wallace v. Kato*. But there are other weighty reasons as well.

First, as demonstrated earlier, despite the significance of this Court's removal of substantive due process from the analytical mix, *Albright v. Oliver* surely did not eliminate the confusion in the circuits about the nature of a section 1983 "malicious prosecution" claim and the extent to which the "background of tort liability" should play a role. It is Defendants' position that the elements of the tort of malicious prosecution should play no role whatsoever in analysis of a section 1983 Fourth Amendment unlawful detention claim. Rather, Fourth Amendment analysis should control, with the extent of liability for any damages that result from unlawful detention governed by generally applicable federal common law principles of causation in fact, proximate cause, and damages that govern section 1983 litigation.

Indeed, Justice Souter appears to make a similar point in his opinion concurring in the judgment in *Albright v. Oliver*, 510 U.S. at 289. He observes that the usual damages resulting from a Fourth Amendment seizure, in contrast to those resulting from the initiation of a baseless prosecution, include "limitations on

his liberty, freedom of association, and freedom of movement . . . ; financial expenses of his legal defense; reputational harm among members of the community: . . . and personal pain and suffering." He then goes on to explain: "[I]t is not surprising that rules of recovery for such claims have naturally coalesced under the Fourth Amendment, since the injuries usually occur only after an arrest or other Fourth Amendment seizure. . . ." *Id.*

Second, this is a recurring issue in the circuits. Section 1983 "malicious prosecution" claims, whether based on the Fourth Amendment or other constitutional provisions, will continue to create confusion nationally until this Court speaks definitively on the matter. Can there be a section 1983 "malicious prosecution" claim at all? If so, under what constitutional provision? Is it the Fourth Amendment? Is it procedural due process? *See, generally, M. Avery, D. Rudovsky and K. Blum*, POLICE MISCONDUCT: LAW AND LITIGATION § 2:14 (2007 Westlaw; POLICEMISC database) (collecting cases and discussing open questions about section 1983 and malicious prosecution); *S. Nahmod*, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 §§3:66-3:67 (4th ed. 1997, 2008; West) (discussing *Albright* and post-*Albright* confusion in the circuits).

Third, it bears emphasis that the Tenth Circuit (and the district court on remand) addressed the arguments of the Defendants about the nature of a section 1983 "malicious prosecution" claim as well as the impact on such a claim of *Wallace v. Kato*, even though these arguments were ultimately and

incorrectly rejected. Specifically, the Tenth Circuit (and the district court) rejected Defendants' contention that a favorable termination requirement was inapplicable to Plaintiffs' section 1983 Fourth Amendment unlawful detention claim. In addition, by imposing such a requirement, the Tenth Circuit (and the district court) declined to apply this Court's accrual decision in *Wallace v. Kato* because they effectively determined that there was no need to do so. Thus, the issues in this Petition were squarely raised and decided. Furthermore, the Defendants, Petitioners here, are knowledgeable about these issues.

Finally, it is vital that police officers, protected not by absolute immunity (unlike prosecutors) but instead by qualified immunity, understand the extent of their potential liability when they arrest pursuant to a warrant that turns out be unsupported by probable cause, even though previously approved by a district attorney, and that leads to detention and prosecution. As a matter of fairness to police officers and to encourage their independent decision-making, qualified immunity jurisprudence requires fair warning of the constitutional norms applicable to their conduct. *See Anderson v. Creighton*, 483 U.S. 635 (1987) and *United States v. Lanier*, 520 U.S. 259 (1997). Regrettably, fair warning is currently missing in the section 1983 "malicious prosecution" area.

CONCLUSION

It is now time to rationalize the "malicious prosecution" intersection of section 1983, Fourth Amendment and accrual law for the benefit of federal and state courts, litigants and police officers.[12] This case presents an ideal opportunity to do so. For all these reasons, Defendants respectfully ask this Court to grant certiorari.

Respectfully submitted,

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[12] The focus of this Petition is on section 1983 Fourth Amendment "malicious prosecution" and accrual under *Wallace v. Kato*. Defendants note for the record, however, that if this Court should grant certiorari, they do not waive any qualified immunity – clearly settled law arguments related to the existence of probable cause to arrest and prosecute the Plaintiffs. They also do not waive their argument that Plaintiffs' criminal proceedings did not terminate in Plaintiffs' favor.

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SHAUN WILKINS and ROY BUCHNER,

Plaintiffs-Appellees,

v.

JUAN DeREYES, FRANK JACOBY, and MICHAEL FENNER,

Defendants-Appellants.

Nos. 06-2245 and 06-2260

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. NO. CIV-02-980-JH)

(Filed Jun. 13, 2008)

Sheldon Nahmod, Professor of Law, Chicago, Illinois (assisted on the briefs by Stephen G. French and Robert W. Becker, French & Associates, P.C., Albuquerque, New Mexico, for Appellants Jacoby and Fenner in 06-2245, and Emily A. Franke and W. Ann Maggiore, Butt, Thornton & Baehr, P.C., Albuquerque, New Mexico, for Appellant DeReyes in 06-2260), for Defendants-Appellants.

Ray Twohig, Albuquerque, New Mexico, for Plaintiffs-Appellees.

Before **TACHA**, **McKAY**, and **TYMKOVICH**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Shaun Wilkins and Roy Buchner became suspects in the 1996 investigation of a quadruple murder at a cabin in the wilderness outside of Torreon, New Mexico. Sergeant Frank Jacoby and Captain Michael Fenner, officers with the New Mexico State Police, and Detective Juan DeReyes, an officer with the Albuquerque Police Department Gang Unit, investigated the crime. As a result of the officers' investigation, Wilkins and Buchner were arrested and twice unsuccessfully prosecuted for the crimes.

In this § 1983 malicious prosecution case, Wilkins and Buchner allege the officers violated their constitutional rights by basing their arrests, and causing subsequent prosecutions, solely on false statements wrongfully coerced from fellow gang members. Concluding that factual questions exist regarding whether the officers fabricated evidence and then relied on it in arresting Plaintiffs as well as causing their prosecutions, we AFFIRM the district

court's denial of qualified immunity to the officers on the malicious prosecution claim.

I. Factual Background

Viewed in the light most favorable to Plaintiffs, *see Clanton v. Cooper,* 129 F.3d 1147, 1153 (10th Cir. 1997), the facts as alleged establish the following.

Murders Connected to Gang Activity

On April 14, 1996, Ben Anaya, Sr. discovered at his cabin the dead bodies of his son Ben Anaya, Jr., his son's girlfriend Cassandra Sedillo, and Sedillo's two children Matthew and Johnny Garcia, ages two and three. The adults had been shot, and the children then starved to death after being locked in the cabin alone. The resulting investigation revealed the murders had taken place between December 12 and December 18, 1995.

Anaya, Jr. had been a member of the 18th Street Gang. The officers, experienced with Albuquerque gang activity, were part of a multi-unit task force investigating the murders. Their suspicion focused on Anaya's fellow gang members. In the course of their investigation, the officers brought in for questioning gang members Shawn Popeleski, Lawrence Nieto, and Plaintiffs, among others.

Initial Interviews

During initial interviews in April 1996, Popeleski and Nieto denied knowing who committed the murders. Disbelieving their stories, the officers brought the suspects in for further interviews. The officers pushed hard for Nieto and Popeleski to implicate Wilkins and Buchner in the quadruple homicide. DeReyes in particular had a personal interest in proving Wilkins committed the crime because "Wilkins had done a drive by shooting on his (DeReyes') house, . . . and his family was threatened by that and had to move." App. 1920. As a result of these interviews, both Nieto and Popeleski eventually implicated Plaintiffs. It is from these interrogations that the claim of fabricated and coerced testimony arises.

Coercive Interrogations and Fabricated Evidence

Plaintiffs contend the officers fabricated evidence by intentionally extracting matching false statements regarding Nieto's and Popeleski's knowledge of the murders and then used the statements as the sole basis for Plaintiffs' subsequent arrest and trial. They claim the officers, using threats and promises, took advantage of Nieto's and Popeleski's age (18) and Nieto's learning disabilities to persuade them to implicate Wilkins and Buchner. The officers threatened them and their families with harm, promising leniency and protection if they cooperated.

Based on these threats and promises, a series of interrogations in May 1996 yielded nearly identical

statements from Nieto and Popeleski, both implicating Plaintiffs Wilkins and Buchner in the quadruple homicide.

(1) The first interrogation of Popeleski took place on May 10, 1996. Although coerced, Popeleski did not provide any useful information that day. But the very next day—and allegedly as a result of May 10 coercion—he quickly implicated Wilkins. He told the officers that Wilkins and Nieto arrived at the cabin and partied with Anaya, Sedillo, and Popeleski on the afternoon of the murders. After Wilkins and Nieto had apparently left and Anaya and Sedillo had gone to bed, Popeleski was outside when two men in ski masks surprised him. One of them held Popeleski on the ground while the other, whom Popeleski recognized as Wilkins, went into the cabin.[1] Popeleski heard gunshots, footsteps, and the front door being locked. He saw the two men run back toward a car that looked like the one Wilkins and Nieto had arrived in earlier. Popeleski tried to chase them in Anaya's jeep but lost them when the jeep stalled.

(2) After the Popeleski interviews, the officers reinterviewed Nieto on May 11, 1996, and coerced a false statement blaming Wilkins for the murders. According to police affidavits, Nieto confessed that

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[1] On April 15, 1996, Fenner noticed marks in the dirt outside the cabin "where it appeared someone had been running, tripped, and fell." App. 644. The officers argue this evidence corroborated Popeleski's statement that he was surprised from behind and ordered to the ground. Aplt. Br. 67.

when Wilkins visited him shortly after the murders appeared on the news, Wilkins told him he had done "some s***" at the cabin. Nieto did not supply any additional details. An arrest warrant was issued for Wilkins based on this information.

(3) The officers interviewed Nieto again on May 13, 1996. Unlike his May 11 interrogation, during which Nieto placed suspicion on Wilkins simply by relaying to the officers Wilkins's statement of doing "some s***" at the cabin, the May 13 interview produced a more detailed account. According to Nieto's affidavit, "a lot more interrogation took place outside of that which was videotaped" on May 13. App. 1920.

The officers allegedly forced Nieto to corroborate the story Popeleski had told them earlier, blaming both Wilkins and Buchner for the murders (although Popeleski had not yet actually mentioned Buchner). *Id.* ("I [Nieto] didn't think I had any choice except to go along with the story [the officers] said they knew and said Popeleski had told. They went over it in detail, then talked to me on the videotape, then went over it again, then talked to me again on the videotape. They put words in my mouth. They supplied the details of the story, then when I told them something, they pressured me to change it."). In the end, Nieto gave two statements, each differing in the details but both implicating Wilkins and Buchner, whom Nieto placed at the cabin with Wilkins. Buchner was arrested for the murders on May 13.

(4) On May 15, 1996, Nieto was interviewed by Agent Lucero of the New Mexico state police, who is not a defendant in this case. Plaintiffs do not contend Lucero used any coercive tactics in this interview, although they claim the statements resulted from the earlier coercive interrogations. Moreover, according to Nieto's affidavit, right before his May 15 interview the officers "coached [Nieto] to change the [May 13] story. . . . [He] went along with that because they pressured [him] to do so." *Id.* at 1921.

In the interview, Nieto told Agent Lucero that Wilkins and Buchner came to his home and asked him to go to the cabin with them to party. Wilkins had a .22 caliber pistol lying on his lap, and on the way to the cabin Wilkins and Buchner told Nieto they were going to kill Popeleski. After spending time at the cabin, Wilkins, Buchner, and Nieto left the cabin, walked back to their car, and donned ski masks and gloves. Nieto had a shot gun, Wilkins the pistol, and Buchner a rifle. After waiting some time, the three went back to the cabin. They saw Popeleski outside, and Wilkins told Nieto to get him. Nieto surprised Popeleski and told him to get on the ground while Wilkins and Buchner entered the cabin. When Nieto heard shots inside, he fired a shot into the air, and Popeleski ran. Wilkins and Buchner were carrying drugs and guns from the cabin and Nieto joined them as they returned to the car. Buchner went back to the cabin to lock the front door, and the three left the area together.

(5) The officers, at that point, had detailed statements from both Nieto and Popeleski, implicating Wilkins in the murders. One major difference remained, however, in that Popeleski's account deviated from Nieto's by omitting Buchner's participation. The officers went back to Popeleski to try and reconcile the two versions of what they wanted to be the same story. When Popeleski was reinterviewed on May 15, 1996, he said he had not mentioned Buchner's presence at the cabin previously because Buchner was from Corrales, and Popeleski had a friend in Corrales he was trying to protect from Buchner. The two accounts were now nearly identical in all relevant respects.

In summary, Plaintiffs contend the officers fabricated evidence by coercing Nieto and Popeleski into giving matching false statements, implicating both Wilkins and Buchner in the quadruple homicide.

Criminal Prosecutions and Mistrials

As a result of the investigation, Buchner and Wilkins were arrested and charged with capital murder. At Buchner's preliminary hearing on May 26, 1996, and at Wilkins's preliminary hearing on July 29, 1996, the prosecution called Popeleski to testify. He testified consistent with his May 11 and 15 statements. Nieto refused to testify on both occasions and was declared unavailable. Agent Lucero instead testified as to Nieto's May 15 statement.

Wilkins went to trial on September 22, 1997, and Buchner went to trial on November 3, 1997. Nieto and Popeleski both refused to testify at Wilkins's trial, but their prior statements were admitted. Nieto testified at Buchner's trial only to the extent of telling the jury that the interrogating officers had forced him to lie about himself and Buchner being at the cabin. Neither jury could reach a verdict and mistrials were declared.[2]

The state initially decided to retry Buchner and Wilkins, but the trial court determined that Nieto's statements would be excluded from evidence in the retrials as inadmissible hearsay. In light of the exclusions, the district attorney decided to dismiss the charges because insufficient evidence existed to go forward with the prosecutions. Accordingly, the district attorney dismissed the criminal cases in January and March 2001, reserving the right to retry both men.

II. Discussion

Plaintiffs sued and alleged violations of federal civil rights, claiming the officers violated their (1) substantive due process rights by coercing matching

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[2] Nieto and Popeleski were also charged with the murders. Nieto testified in his own defense consistent with his May 15, 1996 statement and was convicted, receiving four consecutive life sentences. Popeleski did not testify at his trial, and was convicted of the children's murders. He received a sixteen-year sentence.

statements from Nieto and Popeleski and using those statements against Plaintiffs,[3] and (2) Fourth Amendment rights by arresting them without probable cause, which resulted in subsequent prosecutions, a claim Plaintiffs have styled as malicious prosecution.

The officers moved for summary judgment on two grounds: (1) Plaintiffs' claims were barred by the statute of limitations, and (2) the officers were entitled to qualified immunity. In denying the motion, the district court concluded the statute of limitations did not apply, and Plaintiffs had asserted facts which, if true, would constitute a violation of a clearly established constitutional right.

A. Statute of Limitations

A statute of limitations defense is ordinarily not appealable as part of an interlocutory qualified immunity appeal. *See Moore v. City of Wynnewood,* 57 F.3d 924, 930 (10th Cir. 1995) (limiting pendent appellate jurisdiction to cases "where the otherwise nonappealable decision is inextricably intertwined with the appealable decision, or where review of the nonappealable decision is necessary to ensure meaningful review of the appealable one" (quotation marks omitted)). *But see Rendall-Speranza v. Nassim,* 107 F.3d 913, 917 (D.C. Cir. 1997) (choosing to exercise pendent appellate jurisdiction over the otherwise

[3] Plaintiffs do not raise a procedural due process claim. Aple. Br. 17.

nonappealable statute of limitations issue when, so doing, the "court may be able to dispose of the entire case and thus to economize on the use of judicial resources"). In this case, however, we asked the parties to file supplemental briefing and address how, if at all, the Supreme Court decision in *Wallace v. Kato*, 127 S. Ct. 1091 (2007), issued after the district court's order, affected the statute of limitations arguments. Following oral argument, we directed a limited remand for the district court to reconsider the statute of limitations in light of *Wallace*.

On remand, the district court concluded Plaintiffs' substantive due process claim, filed August 8, 2002, was untimely and dismissed it with prejudice. Thus, Defendants' Motion for Exercise of Pendent Appellate Jurisdiction is denied as moot.

With respect to Plaintiffs' malicious prosecution claim, however, the district court relied on the favorable termination requirement (which we discuss below) and concluded the claim had not accrued until the government dismissed criminal charges in 2001. Therefore, the district court found the malicious prosecution claim was timely filed in August 2002.

As a result of the district court's disposition on remand, we need only address Plaintiffs' Fourth Amendment malicious prosecution claim in this appeal.

B. Qualified Immunity

Turning to Plaintiffs' malicious prosecution claim, we agree with the district court that the officers are not entitled to qualified immunity.

Qualified immunity shields public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald,* 457 U.S. 800, 806 (1982). But qualified immunity is unwarranted when a plaintiff can overcome a two-part burden: plaintiff (1) "must . . . establish that the defendant violated a constitutional right" and (2) "must then show that the constitutional right was clearly established," such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation." *Cortez v. McCauley,* 478 F.3d 1108, 1114 (10th Cir. 2007) (en banc).

"Orders denying qualified immunity before trial are appealable to the extent they resolve abstract issues of law." *Foote v. Spiegel,* 118 F.3d 1416, 1422 (10th Cir. 1997) (citing *Behrens v. Pelletier,* 516 U.S. 299, 313 (1996)); *accord Johnson v. Jones,* 515 U.S. 304, 312-14 (1995); *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985); *Medina v. Cram,* 252 F.3d 1124, 1130 (10th Cir. 2001). But at the interlocutory appeal stage, we have no jurisdiction to review the district court's rulings based on the sufficiency of the evidence—"which facts a party may, or may not, be able to prove at trial." *Medina,* 252 F.3d at 1130 (quoting *Johnson,* 515 U.S. at 313-18). We may review only whether "under [Plaintiffs'] version of the facts,

[Defendants] violated clearly established law. In making this determination, we must scrupulously avoid second-guessing the district court's determinations regarding whether [Plaintiffs have] presented *evidence* sufficient to survive summary judgment." *Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir. 1997). "[W]here the district court makes a legal finding and states specific facts upon which that finding is based, we do not have jurisdiction to delve behind the ruling and review the record to determine if the district court correctly interpreted those facts to find a genuine dispute." *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1259 (10th Cir. 1998).

Under this framework, to establish a constitutional violation Plaintiffs must assert facts meeting the elements of a § 1983 malicious prosecution claim. In this case, Plaintiffs argue the officers violated their Fourth Amendment rights by arresting them without probable cause, which led to lengthy detentions while Plaintiffs were being prosecuted. If so, they argue any reasonable police officer would know the law clearly established such conduct as unlawful.

At this stage of the case, construing the facts in favor of Plaintiffs, our review is limited to two purely legal issues: (1) whether the alleged facts, if true, amount to a constitutional violation, and (2) whether the alleged constitutional violation was clearly established at the time of the challenged action. *See Cortez*, 478 F.3d at 1114. Analyzing these two issues, we conclude the district court correctly

denied the officers qualified immunity on Plaintiffs' malicious prosecution claim.

1. Constitutional Violation

The common law elements of malicious prosecution are the "starting point" for our analysis of a § 1983 malicious prosecution claims. *Pierce v. Gilchrist,* 359 F.3d 1279, 1285-86 (10th Cir. 2004). But "the ultimate question" in such a case "is whether plaintiff has proven the deprivation of a constitutional right." *Novitsky v. City of Aurora,* 491 F.3d 1244, 1257-58 (10th Cir. 2007) (citing *Taylor v. Meacham,* 82 F.3d 1556, 1561 (10th Cir. 1996)); *see also Pierce,* 359 F.3d at 1288. Because Plaintiffs premised their § 1983 malicious prosecution claim on a violation of the Fourth Amendment right to be free from unreasonable seizures, we analyze the elements of their claim in light of Fourth Amendment guarantees.[4]

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[4] Our cases suggest a § 1983 malicious prosecution claim need not always rest on the right to be free from unreasonable searches and seizures under the Fourth Amendment. As we have previously noted, a plaintiff's § 1983 malicious prosecution claim may also encompass procedural due process violations. *Pierce,* 359 F.3d at 1285-86 ("The initial seizure is governed by the Fourth Amendment, but at some point after arrest, and certainly by the time of trial, constitutional analysis shifts to the Due Process Clause."); *see generally* 1 Wayne R. LaFave et al., *Criminal Procedure* § 2.7(a)-(c) (3d ed. 2007) (describing numerous procedural due process guarantees that apply during the investigatory, charging, pretrial, trial, and sentencing stages).

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Unlike a false arrest or false imprisonment claim, malicious prosecution concerns detention only "[a]fter the institution of legal process." *Mondragon v. Thompson,* 519 F.3d 1078, 1083 (10th Cir. 2008); *see also Wallace v. Kato,* 127 S. Ct. 1091, 1096 (2007) ("[A]fter [institution of legal process], unlawful detention forms part of the damages for the . . . tort of malicious prosecution, which remedies detention accompanied not by absence of legal process, but by *wrongful institution* of legal process."). In this context, a Fourth Amendment violation can exist only when a plaintiff alleges the legal process itself to be wrongful. If a plaintiff challenges merely the confinement *after* the institution of legal process, but not

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But see Mondragon v. Thompson, 519 F.3d 1078, 1083 n.5 (10th Cir. 2008) ("[A]dditional requirements, such as the [absence] of adequate state law remedies, might apply to a procedural due process claim.") (citing *Becker v. Kroll,* 494 F.3d 904, 917-22 (10th Cir. 2007)); *Morgan v. Gertz,* 166 F.3d 1307, 1310 (10th Cir. 1999) ("Regardless of any misconduct by government agents before or during trial, a defendant who is acquitted cannot be said to have been deprived of the [procedural due process] right to a fair trial."). In this case, Plaintiffs have disavowed any claim they may have based on procedural due process. Aple. Br. 17.

Other "explicit constitutional right[s]" could also conceivably support a § 1983 malicious prosecution cause of action, *see* Michael Avery et al., *Police Misconduct: Law and Litigation* § 2:14 & n.5 (2007 Westlaw; POLICEMISC database) (collecting cases), although the Supreme Court specifically excluded substantive due process as the basis for a malicious prosecution claim. *Albright v. Oliver,* 510 U.S. 266, 274-75 (1994). Here, Plaintiffs have not alleged any other constitutional violation in support of their malicious prosecution theory.

the process itself, "[t]he protections offered by the Fourth Amendment do not apply." *Jones v. City of Jackson,* 203 F.3d 875, 880 (5th Cir. 2000); *see also Taylor v. Waters,* 81 F.3d 429, 436 (4th Cir. 1996) ("[D]etermination of probable cause by detached judicial officer that complies with Fourth Amendment constitutes all of the process due in order to constitutionally detain an accused pending trial.") (citing *Baker v. McCollan,* 443 U.S. 137, 142-46 (1979)).

Depending on the circumstances of the arrest, a plaintiff can challenge the institution of legal process as wrongful in one of two ways. If arrested without a warrant—and thus triggering "the Fourth Amendment require[ment of] a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest," *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975)—a plaintiff can challenge the probable cause determination made during the constitutionally-required probable cause hearing. *See, e.g., Reed v. City of Chicago,* 77 F.3d 1049, 1053-54 (7th Cir. 1996) (concluding the plaintiff failed to state a malicious prosecution claim when he challenged only the warrantless arrest, but not the subsequent institution of legal process). Or, if arrested pursuant to a warrant, plaintiff can challenge the probable cause determination supporting the warrant's issuance. *See, e.g., Meacham,* 82 F.3d at 1562 (analyzing the Fourth Amendment malicious prosecution claim "that the affidavit prepared . . . in support of the arrest warrant contained deliberately false statements and omissions, thereby misleading the judge into issuing

the arrest warrant"). Either way, the allegation would state a Fourth Amendment violation sufficient to support a § 1983 malicious prosecution cause of action.[5]

In this case, Plaintiffs were detained pursuant to arrest warrants. At common law, the issuance of an arrest warrant represents a classic example of the institution of legal process. *See* Restatement (Second) of Torts § 654 cmt. c (1977) ("Criminal proceedings are usually instituted by the issuance of some form of process, *generally a warrant for arrest,* the purpose of which is to bring the accused before a magistrate in order for him to determine whether the accused shall be bound over for further action by a grand jury or for trial by a court." (emphasis added)). Plaintiffs' detention was thus preceded by the institution of legal process, triggering the malicious prosecution cause of action. *See* Michael Avery et al., *Police Misconduct: Law and Litigation* § 2:10 (2007 Westlaw;

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[5] Because a person unlawfully arrested without legal process can bring a Fourth Amendment claim sounding in false imprisonment, *Wallace*, 127 S. Ct. at 1095, the malicious prosecution framework in a sense allows a second Fourth Amendment claim to come on the heels of the first one. *Mondragon*, 519 F.3d at 1083 n.4 (noting, in a case dealing with a forged arrest warrant, "[w]e do not foreclose the additional, though unlikely, possibility of a second Fourth Amendment claim, arising after the first one ends" (citing *Wallace*, 127 S. Ct. at 1096 n.2)). But because the institution of legal process separates the two claims—and thus makes them legally distinct—we think the two claims, though grounded in the same constitutional provision, can coexist.

POLICEMISC database) ("The Supreme Court's analysis in *Wallace* . . . indicates that such claims should not be characterized as false arrest or false imprisonment, because detention of the subject is pursuant to legal process."). In challenging that process by alleging the officers knowingly supplied false information in affidavits for the warrants, Plaintiffs based their malicious prosecution claim on the Fourth Amendment right against unreasonable seizures.

Under our cases, a § 1983 malicious prosecution claim includes the following elements: (1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages. *Novitsky*, 491 F.3d at 1258 (citing *Pierce*, 359 F.3d at 1291-97). In Plaintiffs' case, the third element deals only with the probable cause determination during the institution of legal process—in other words, with the applications for arrest warrants. This link supplies the necessary connection between the malicious prosecution cause of action and Plaintiffs' Fourth Amendment allegations.

With the above in mind, we first examine whether fact questions limit our review of the alleged constitutional violation, *see Sevier v. City of Lawrence*, 60 F.3d 695, 701 (10th Cir. 1995), and then

turn to whether the officers are entitled to qualified immunity as a matter of law.

a. Existence of Fact Questions as to Malice

Reviewing the officers' motion for summary judgment, the district court determined Plaintiffs presented sufficient evidence to create a fact question as to whether the officers fabricated evidence to arrest and prosecute them. In finding a factual basis for the theory that the officers coerced false testimony, the court pointed to the following evidence: Nieto's and Popeleski's susceptibility to the tactics employed in the interrogations because of their age and lack of education; other circumstances of the interrogations; and numerous statements by the officers, at times threatening harm to Nieto and Popeleski or their families and at other times promising help and safety.

Taking these allegations as a whole, the district court found the evidence "viewed in the light most favorable to the Plaintiffs, implied [DeReyes] wanted to pin the murders on Wilkins . . . and that the only way for Nieto to help himself was to say that Wilkins was involved." App. 2902. The district court also found the evidence in the light most favorable to Plaintiffs established Popeleski's statements were similarly coerced by "egregious . . . promises of help and safety, as well as the threats of harm." *Id.* at 2906. Finally, the district court found a factual

dispute regarding whether the officers acted recklessly or intentionally in coercing false statements.

The officers responded that even under the totality of the circumstances, they never made threats or promises "sufficiently compelling and linked to the confession so that it could be said that [Nieto's and Popeleski's] will[s were] overcome by the offer[s]." *Clanton,* 129 F.3d at 1159. But the district court found "a fact issue exists as to whether Defendants coerced statements from Nieto and Popeleski," App. 2915, and here we must defer to the district court's expertise in determining "the existence, or nonexistence, of a triable issue of fact." *Johnson,* 515 U.S. at 316.

We thus will not review the district court's conclusion that on this record coercion presents a disputed factual issue. We took the same approach in *Clanton* where we determined "coercion is a factual issue that must be evaluated on the entire record" and decided the district court's determination that the plaintiff had presented evidence of coercion was "sufficient to preclude our review on interlocutory appeal." 129 F.3d at 1159; *see also Johnson,* 515 U.S. at 316 (noting that reviewing factual disputes on interlocutory appeal would "require reading a vast pretrial record" and cause undue delay). The issues Plaintiffs present with regard to the allegedly coerced statements are sufficiently fact-oriented—requiring an analysis of the meaning and purpose of the officers' statements to Nieto and Popeleski—to prevent us from exercising jurisdiction over the district court's

sufficiency of evidence determination on interlocutory appeal.

In addition, whether Plaintiffs have presented sufficient evidence of fabricated testimony bears on Plaintiffs' malicious prosecution claim because, as the district court explained,

> If those statements were indeed involuntary, then the officers who carried out the alleged coercion could not reasonably rest their determination of probable cause upon those statements. On the other hand, if Defendants did not coerce the statements from the witnesses, then it would be proper for Defendants to . . . base their determination of probable cause on those statements.

App. 2915. For purposes of the malicious prosecution claim, then, disputed factual issues remain not only whether Nieto's and Popeleski's statements were involuntary and false, but also whether a reasonable officer would have known so.

We acknowledge the officers' contention that, even if Nieto's and Popeleski's statements were in fact coerced, the officers could reasonably, though mistakenly, have concluded those confessions constituted reliable evidence for purposes of probable cause. Qualified immunity of course "operates to grant officers immunity for reasonable mistakes as to the legality of their actions." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). The district court, however, specifically found Plaintiffs had presented sufficient evidence to show

the officers recklessly or intentionally coerced *false* statements, and we cannot review this evidentiary conclusion on appeal. If the officers acted intentionally or recklessly to fabricate evidence, they plainly are not entitled to a qualified immunity defense based on a reasonable mistake.

Because we may not review the district court's evaluation of the factual issues surrounding coercion, we accept for purposes of this appeal that Nieto's and Popeleski's statements were involuntary and false and that the officers knew so.

b. Questions of Law Regarding the Elements of Malicious Prosecution

We have already concluded that fact issues remain regarding whether the officers knowingly relied on false evidence, and, accordingly, we must assume Plaintiffs can meet the malice element of their malicious prosecution claim. The only other arguments the officers raise are (1) whether, as a matter of law, excluding the fabricated testimony would vitiate probable cause, and (2) whether the prosecution was favorably terminated as to Plaintiffs.[6] We agree with the district court that without

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[6] Plaintiffs argue we need not consider the favorable termination element on appeal. They argue we instead need focus only on whether Plaintiffs have shown an absence of probable cause. We disagree. The Supreme Court in *Heck v. Humphrey*, 512 U.S. 477, 484-86 (1994), described favorable

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the coerced statements, the officers lacked probable cause to arrest Plaintiffs and cause their subsequent detentions and prosecutions. We also agree the prosecutions were favorably terminated.

The Absence of Probable Cause

"Probable cause for an arrest warrant is established by demonstrating a substantial probability that a crime has been committed and that a specific individual committed the crime." *Wolford v. Lasater,* 78 F.3d 484, 489 (10th Cir. 1996). In the affidavits supporting warrants to arrest Plaintiffs, the officers relied entirely on the allegedly coerced false statements of Nieto and Popeleski. App. 600-03 (Wilkins), 610-13 (Buchner). Thus, if we set aside, as we must, the false information, *Pierce,* 359 F.3d at 1294-95, nothing is left in the affidavits to support probable cause for Plaintiffs' arrests.

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termination as an essential element of a malicious prosecution action under § 1983, since the common law immunities and limits serve important purposes inherent in § 1983 actions, namely to prevent conflicting resolution of the probable cause assessment. And although the Court later clarified that the *Heck* favorable termination requirement does not apply to false arrest claims in the absence of an existing conviction, *Wallace,* 127 S. Ct. at 1097-98, the requirement remains an essential element of a § 1983 claim sounding in malicious prosecution. Thus, the Supreme Court continues to instruct that to survive qualified immunity, a plaintiff must allege a constitutional violation, including, in a malicious prosecution case, favorable termination.

The officers argue they had probable cause even without the allegedly coerced confessions. In support, they point to the following additional evidence: (1) Wilkins owned a .22 caliber handgun, the same caliber used in the murders; (2) Buchner made callous remarks about the victims, specifically that he "did not give a f*** about the kids," App. 429; (3) a polygraph of Popeleski indicated he was deceptive when he said he was not present at the killings and did not know who the killer was; (4) a polygraph of Nieto indicated he was truthful when he denied shooting the victims; (5) a polygraph of Wilkins indicated he was deceptive when he said he did not shoot Anaya; and (6) the interview conducted by Lucero after the allegedly coercive interrogations confirmed Nieto's and Popeleski's earlier statements implicating Plaintiffs.[7]

But because the officers revealed none of the additional information during the institution of legal process—in this case, during the arrest warrant applications—the officers cannot use this information to escape liability. If institution of legal process is required to trigger a malicious prosecution claim, we

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[7] Evidence that Nieto's and Popeleski's statements were consistent with each other's statements and their polygraphs does not contribute to probable cause if, as Plaintiffs allege, the officers coerced Nieto and Popeleski into giving matching false statements. Similarly, marks in the dirt outside the cabin corroborating the allegedly coerced statements do not contribute to probable cause because the marks have no meaning without the statements.

ought not search for probable cause in a pile of unrevealed information. The Fourth Amendment in the context of a malicious prosecution claim deals with *judicial determinations* of probable cause, either at the warrant application stage or during a *Gerstein* hearing following a warrantless arrest. Judicial determination becomes a misnomer if information required to support probable cause remains at all times firmly lodged in the officer's head. *See Whiteley v. Warden, Wyo. State Penitentiary,* 401 U.S. 560, 565 n.8 (1971) ("[A]n otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. . . . A contrary rule would, of course, render the [legal process] requirements of the Fourth Amendment meaningless.").

To be sure, Agent Lucero did testify weeks later at Plaintiffs' preliminary hearings consistent with his May 15 interview of Nieto. But even if this interview were sufficiently attenuated from the allegedly coercive interrogations a couple of days earlier (which we doubt), Lucero's testimony would at most limit Plaintiffs' damages by breaking the chain of causation between the Fourth Amendment violations and subsequent confinements. *See Meacham,* 82 F.3d at 1564 (citing *Reed,* 77 F.3d at 1049, to explain that a preliminary hearing conducted after the institution of legal process can break the causal chain). And in any event, deciding this case at the qualified immunity

stage, we have no jurisdiction to address any causation issues.

Thus, Plaintiffs' allegations, if proven, satisfy the absence of probable cause element of their malicious prosecution claim.

Favorable Termination

The district attorney dismissed charges against Wilkins and Buchner by filing *nolle proseques* in early 2001.[8] "Criminal proceedings are terminated in favor of the accused by the formal abandonment of the proceedings by the public prosecutor." Restatement (Second) of Torts § 659(c) (1977). But abandonment of the proceedings is ordinarily insufficient to constitute a favorable termination if "the prosecution [is] abandoned pursuant to an agreement of compromise with the accused; . . . because of misconduct on the part of the accused . . . ; [or] out of mercy requested or accepted by the accused." *Id.* § 660.[9] These reasons for

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[8] A *nolle prosequi* represents a "legal notice that a . . . prosecution has been abandoned." *Black's Law Dictionary* 1074 (8th ed. 2004); *see also Washington v. Summerville*, 127 F.3d 552, 557 (7th Cir. 1997) ("A *nolle prosequi* is not a final disposition of a case but is a procedure which restores the matter to the same state which existed before the Government initiated the prosecution.").

[9] In full, Section 660 reads:

> A termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if

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withdrawal of a charge do not necessarily constitute favorable terminations because they do not "indicate the innocence of the accused" or are at least "consistent with guilt." *Id.* cmt. a.

On the other hand, the inability of a prosecutor to prove a case beyond a reasonable doubt at trial can be consistent with the innocence of the accused and can be deemed a favorable termination in favor of the accused. *Id.* cmt. d. Concluding a case cannot be proven beyond a reasonable doubt, a prosecutor might withdraw a criminal charge. One way to do this is to abandon or suspend a prosecution by "enter[ing] a nolle prosequi after an indictment has been found." *Id.* cmt. b.

To decide whether a *nolle prosequi* constitutes a favorable termination, we look to the stated reasons for the dismissal as well as to the circumstances surrounding it in an attempt to determine whether

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(a) the charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused; or

(b) the charge is withdrawn or the prosecution abandoned because of misconduct on the part of the accused or in his behalf for the purpose of preventing proper trial; or

(c) the charge is withdrawn or the proceeding abandoned out of mercy requested or accepted by the accused; or

(d) new proceedings for the same offense have been properly instituted and have not been terminated in favor of the accused.

the dismissal indicates the accused's innocence. *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 925 (7th Cir. 2001) ("To determine whether the proceedings against [the defendant] were terminated in his favor, we must look past the form or title of the disposition and examine the circumstances surrounding the entry of the *nolle prosequi*."). "The plaintiff has the burden of proving a favorable termination." *Washington v. Summerville*, 127 F.3d 552, 557 (7th Cir. 1997). To that end, a "bare nolle prosse without more is not indicative of innocence." *Id.* at 558. The "dispositive inquiry is whether the failure to proceed implies a lack of reasonable grounds for the prosecution." *Murphy v. Lynn*, 118 F.3d 938, 948 (2d Cir. 1997) (internal quotations and brackets omitted).[10]

In the circumstances here, the *nolle proseques* should be considered terminations in favor of Plaintiffs. The dismissals were not entered due to any compromise or plea for mercy by either Wilkins or Buchner. Rather, they were the result of a judgment by the prosecutor that the case could not be proven beyond a reasonable doubt. App. 1053 (Buchner), 1056 (Wilkins) ("[I]t is the State's opinion

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[10] In one case, a court has concluded the stated reasons for the *nolle proseques* precluded an inference of a favorable termination. *See Donahue v. Gavin*, 280 F.3d 371, 384 (3d Cir. 2002) (concluding the *nolle proseques* did not indicate innocence when the "prosecutor simply reasoned that Donahue was not likely to receive any additional jail time if convicted in a retrial").

that currently there is insufficient evidence upon which to retry the defendant[s] for these crimes.").

Nor can we conclude Wilkins and Buchner engaged in prohibited misconduct when they successfully moved to exclude Nieto's May 15 interview as hearsay. To be sure, "[a]mong the types of misconduct on the part of the accused" that turn the resultant *nolle proseques* into unfavorable terminations is "the suppression of evidence . . . that prevents a fair hearing of the cause." Restatement § 660 cmt. d. "Since lumped together with other 'misconduct' of the accused, this reference to suppression of evidence apparently refers to the hiding of evidence by the accused, *not suppression of evidence in accordance with an evidentiary ruling.*" *Dobiecki v. Palacios*, 829 F. Supp. 229, 235 (N.D. Ill. 1993) (emphasis added).

Such an understanding takes into account the Restatement's clarification that "[n]ot included [in the definition of misconduct] are claims of constitutional or other privilege . . . and similar conduct that merely forces the state to prove its case beyond a reasonable doubt in a trial otherwise fair and proper." Restatement § 660 cmt. d; *Dobiecki*, 829 F. Supp. at 235. Under this formulation, "[i]f the circumstances show that unreliable evidence has been suppressed and the prosecution then abandons the case because of lack of sufficient reliable evidence, that would be a circumstance where the dismissal is indicative of innocence." *Dobiecki*, 829 F. Supp. at 235. But "if the evidence was only suppressed on 'technical' grounds having no or little relation to the evidence's trustworthiness,

then the fact that there was not other sufficient evidence would not be indicative of innocence." *Id.* at 235-36.

The suppressions in Wilkins's and Buchner's criminal cases excluded unreliable evidence not falling within any of the exceptions. App. 1002-32. These were not instances of hiding otherwise perfectly reliable evidence. *See Dobiecki,* 829 F. Supp. at 235-36 (concluding the termination not favorable when defendant moved to suppress "a custodial confession . . . obtained without the benefit of *Miranda* warnings," a purely "prophylactic [dismissal] on 'technical' grounds having no or little relation to the evidence's trustworthiness"); *Miller v. Cuccia,* 201 F.3d 431, 431 (2d Cir. 1999) (unpublished disposition) ("The suppression of the inculpatory evidence does not establish or imply appellant's innocence because it was not related to or based upon the reliability or unreliability of the evidence."). To the contrary, far from moving to exclude evidence on a mere technicality unrelated to the evidence's reliability, Wilkins and Buchner forced the district attorney to prove their guilt without using unreliable evidence. The district attorney, having concluded that without the excluded testimony he could not prove the charged crimes beyond a reasonable doubt, dismissed the charges.

In this case, therefore, insufficient evidence to convict Plaintiffs is consistent with favorable termination. In other words, we can infer innocence from both the stated reasons for the *nolle proseques* and the surrounding circumstances. Accordingly, we agree

with the district court that Plaintiffs satisfied the favorable termination requirement of their malicious prosecution claim.

* * *

In sum, the alleged facts establish the elements of the constitutional tort of malicious prosecution.

2. Clearly Established

We now turn to whether the law regarding the alleged constitutional violation was clearly established. If it was not, qualified immunity applies.

The constitutional right Plaintiffs allege was violated was clearly established if the "contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier v. Katz,* 533 U.S. 194, 202 (2001) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* "For the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must be as plaintiff maintains." *Foote v. Spiegel,* 118 F.3d 1416, 1424 (10th Cir. 1997). "[T]he salient question . . . is whether the state of the law [at the time of the conduct] gave [Defendants] fair warning that their

alleged treatment of [Plaintiffs] was unconstitutional." *Hope v. Pelzer,* 536 U.S. 730, 741 (2002).

If the officers intentionally coerced false statements from Nieto and Popeleski, the law clearly prohibited the use of those statements to seek warrants for Plaintiffs' arrests. Thus, if the officers acted as Plaintiffs allege, they had fair warning their treatment of Plaintiffs beginning in May 1996 was unconstitutional.

First, it was clearly established that false evidence cannot contribute to a finding of probable cause. Probable cause depends on "reasonably trustworthy information." *Beck v. Ohio,* 379 U.S. 89, 91 (1964). The Supreme Court has held it is a violation of the Fourth Amendment to "'knowingly, or with reckless disregard for the truth,' include false statements in the affidavit" outlining probable cause for an arrest. *Wolford v. Lasater,* 78 F.3d 484, 489 (10th Cir. 1996) (quoting *Franks v. Delaware,* 438 U.S. 154, 155-56 (1978)); *accord Stewart v. Donges,* 915 F.2d 572, 581-82 (10th Cir. 1990).

Where false statements have been relied on to establish probable cause, "the existence of probable cause [for § 1983 purposes] is determined by setting aside the false information." *Wolford,* 78 F.3d at 489; *accord Pierce,* 359 F.3d at 1294-95. Thus, if Plaintiffs' allegations are true, the officers obviously could not rely on fabricated evidence in evaluating whether probable cause existed to arrest and prosecute Plaintiffs. And as we have already explained, without the

coerced confessions, the officers lacked probable cause.

Second, it of course has long been clearly established that knowingly arresting a defendant without probable cause, leading to the defendant's subsequent confinement and prosecution, violates the Fourth Amendment's proscription against unreasonable searches and seizures. *E.g. Meacham,* 82 F.3d at 1561 (citing *Albright v. Oliver,* 510 U.S. 266 (1994), and holding one constitutional right protected by § 1983 malicious prosecution claims "is the Fourth Amendment's right to be free from unreasonable seizures"); *see also, e.g., Gerstein v. Pugh,* 420 U.S. 103, 114 (1975) ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.").

* * *

Thus, Plaintiffs have presented facts that, if true, constitute a violation of the Fourth Amendment. Without the allegedly fabricated statements, the officers did not present information from which a detached magistrate could conclude probable cause existed to justify continued detention. Under the version of facts presented by Plaintiffs and accepted by the district court on summary judgment, the officers intentionally coerced matching false statements, and a reasonable officer should have known no probable cause existed without the statements.

The officers are therefore not entitled to qualified immunity on the malicious prosecution claim.

III. Conclusion

For the foregoing reasons, we AFFIRM the decision of the district court denying the officers qualified immunity for Plaintiffs' malicious prosecution claim.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHAUN WILKINS and ROY BUCHNER, Plaintiffs-Appellees, v. JUAN DeREYES, FRANK JACOBY, and MICHAEL FENNER, Defendants-Appellants.	Nos. 06-2245 and 06-2260 (D.C. No. CIV-02-980-JH)

JUDGMENT

(Filed Jun. 13, 2008)

Before **TACHA**, **McKAY**, and **TYMKOVICH**, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SHAUN WILKINS
and ROY BUCHNER,

Plaintiffs,

CIV. No.
02-980 JH/RLP

vs.

DETECTIVE JUAN DE REYES, Albuquerque Police Dept.; AGENT FRANK JACOBY, New Mexico Dept. of Public Safety; SARGENT [sic] MICHAEL FENNER, New Mexico Dept. of Public Safety,

Defendants.

SUPPLEMENTAL MEMORANDUM OPINION AND ORDER

(Filed Feb. 13, 2008)

This matter is before the Court as a result of the December 7, 2007, Order of the United States Court of Appeals for the Tenth Circuit, in which it directed a limited remand of the case to this Court to consider the impact of *Wallace v. Kato*, 127 S. Ct. 1091 (2007) on Plaintiffs' substantive due process and malicious prosecution claims. Thereafter, the Court ordered the parties to submit supplemental briefing on the issues raised by the Tenth Circuit. In accordance with that Order, the Court issues this Supplemental Memorandum Opinion and Order. After reviewing the *Wallace* opinion, the arguments of the parties, and other

applicable authorities, the Court concludes that Plaintiffs' malicious prosecution claims are timely, while their substantive due process claims are not.

BACKGROUND

In a Memorandum Opinion and Order entered August 16, 2006, this Court set forth the facts of this case (which it will not repeat here) and examined Defendants' argument that Plaintiffs' claims were barred by the statute of limitations. In that opinion, the Court analyzed the United States Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), in which the court held that a civil tort action, including an action under 42 U.S.C. § 1983, is not an appropriate vehicle for challenging the validity of outstanding criminal judgments. Under *Heck*, when a plaintiff alleges tort claims against his arresting officers, the district court must first consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence. *Id.* at 487. If so, the claim is barred unless the plaintiff demonstrates that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus under 28 U.S.C. § 2254. *Id.* at 486-87. This Court also considered the Tenth Circuit's opinion in *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553 (10th Cir. 1999) and similar decisions from several other circuit courts, in which those courts held that

the principles of *Heck* apply with equal force to bar Section 1983 claims relating to pending criminal charges when a judgment in favor of the plaintiff would necessarily imply the invalidity of a *future* conviction or sentence. After considering these precedents, this Court concluded that none of Plaintiffs' claims accrued until January 3, 2001 (for Plaintiff Wilkins) and March 2, 2001 (for Plaintiff Buchner), the dates upon which the prosecutor filed nolle prosequis on the criminal charges against them, reasoning that until those dates, a civil judgment in Plaintiffs' favor on their claims in this case would have conflicted with any possible future criminal judgments against them. Accordingly, this Court ruled that New Mexico's three-year statute of limitations did not bar Plaintiffs' claims.

Approximately six months after this Court's decision, the Supreme Court issued its opinion in *Wallace v. Kato*. In *Wallace*, the issue was whether plaintiffs Section 1983 claim for unlawful arrest in violation of the Fourth Amendment satisfied the statute of limitations. 127 S. Ct. at 1094. Although the petitioner argued that his claim accrued when his conviction was set aside, the Seventh Circuit had concluded that accrual occurred at the time of his arrest. *Id.* First, the Supreme Court observed that "it is the standard rule that accrual occurs when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Id.* at 1095 (internal citations and quotations omitted). Then, analogizing the petitioner's unlawful

arrest claims to the common law torts of false arrest and false imprisonment, the court reasoned that petitioner's claims arose from his detention without legal process. Thus, the limitations period began to run when the alleged false imprisonment came to an end—either by the release of the detainee, or by the institution of valid legal process, such as arraignment on charges. *Id.* at 1095-96. However, the court also pointed out that while the limitations period does not begin to run until that time, he could have filed suit immediately upon his false arrest because he was injured and suffered damages at that moment, and therefore he had a complete and present cause of action. *Id.* at 1096 n. 3.

Next, the *Wallace* court addressed petitioner's contention that under *Heck*, his claim could not have accrued until the State dropped the pending criminal charges against him. *Id.* at 1097. That argument met with disdain, as the Supreme Court explained that *Heck* merely "delays what would otherwise be the accrual date of a tort action until the setting aside *of an extant conviction* which success in that tort action would impugn," but rejected as "bizarre" the notion that the *Heck* rule could delay the accrual of a civil claim that might invalidate an anticipated future conviction. *Id.* at 1098 (emphasis in original). In so holding, the *Wallace* court characterized petitioner's argument as an impractical extension of *Heck*, outlining the complications that would arise from applying the *Heck* rule to "an action which would impugn *an anticipated future conviction*." *Id.* (emphasis in

original). Thus, the rationale of *Beck* extending the *Heck* rule to future convictions, as well as that in similar decisions from other circuit courts upon which this Court relied, has been effectively overruled.

After reading *Wallace*, this Court draws the following lessons. In reviewing a claim for timeliness under Section 1983, the district court must first determine whether that claim has matured, giving consideration to whether the plaintiff has a complete and present cause of action. If so, then the court should decide whether the success of the claim would impugn the plaintiff's existing criminal conviction. If so, the Section 1983 claim should be dismissed without prejudice in accordance with *Heck*. Given the changes on the legal landscape wrought by *Wallace*, the Tenth Circuit now asks this Court to reevaluate its prior decision on Defendants' statute of limitations defense with regard to two of Plaintiffs' claims—violation of due process rights and malicious prosecution under Section 1983.

DISCUSSION

I. DUE PROCESS

After reviewing *Wallace*, the Court concludes that its rationale applies to Plaintiffs' substantive due process claims, and that those claims accrued when Plaintiffs learned of Lawrence Nieto's May 11, 1996 interview in which, subject to alleged coercion, he accused Plaintiffs of committing the Torreon cabin murders. Although *Wallace* analyzed a claim for

unlawful arrest, not substantive due process, the case teaches us more generally that a claim accrues when the plaintiff has a complete and present cause of action, i.e, when the plaintiff could file a lawsuit and obtain relief. 127 S. Ct. at 1095. Of course, *Wallace* does nothing to change the well established federal discovery rule, which provides that a plaintiff's cause of action accrues when that plaintiff knew or should have known of the fact and cause of his injuries. *See Smith v. City of Enid, Okla.*, 149 F.3d 1151, 1154 (10th Cir. 1998) (observing that civil rights claims brought under Section 1983 accrue "when the plaintiff knows or should know that his or her constitutional rights have been violated.") (quoting *Lawshe v. Simpson*, 16 F.3d 1475, 1478 (7th Cir. 1994)). In short, once the cause of action is complete and the plaintiff has either actual or constructive knowledge of it, the statute of limitations begins to run.

In this case, Plaintiffs' due process claim arises from the allegation that Defendants deliberately coerced false statements from Nieto and used them in the criminal prosecution of Plaintiffs. Thus, Plaintiffs had a complete and present cause of action for violation of substantive due process rights at the moment when Defendants used Nieto's allegedly coerced statements in furtherance of the criminal prosecution of Plaintiffs. Of course, their civil rights claims did not actually accrue, and the statute of limitations did not begin to run, until such time as Plaintiffs either knew or reasonably should have known that Defendants were using such statements against them.

Defendants contend, and Plaintiffs do not dispute, that Buchner possessed such knowledge on April 14, 1997, while Wilkins knew on June 30, 1999. Although at that time success on their substantive due process claims would have impugned any future criminal convictions the State of New Mexico might have obtained against Plaintiffs, under *Wallace* that fact does not toll the statute of limitations. Plaintiffs filed their complaint on August 8, 2002, more than three years later than both of these dates. Accordingly, their claims are untimely.

Plaintiffs argue that their substantive due process claim did not accrue on those dates because the harm Plaintiffs experienced was not complete, Instead, they contend that after April 14, 1997, and June 30, 1999, Defendants committed continuing violations of Plaintiffs' constitutional rights by "covering up" their coercion of Nieto and hiding exculpatory evidence. According to Plaintiffs, this continuing violation did not end (and their claims did not accrue) until the New Mexico Court of Appeals affirmed the district court's exclusion of the allegedly coerced interviews because until that time, the fabricated evidence could have been used by the State against Plaintiffs in a second criminal trial. In other words, Plaintiffs contend that they experienced ongoing harm, and their claims did not accrue until they had suffered the full extent of their damages. The Court disagrees with Plaintiffs' argument because under *Wallace*, the claim is complete when all the elements

are present, regardless of whether a plaintiff has experienced the full extent of his injuries:

> Under the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable. Were it otherwise, the statute would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed statute of repose in the sole hands of the party seeking relief.

Wallace, 127 S. Ct. at 1097 (internal quotations and citations omitted). In this case, the Plaintiffs knew their substantive due process rights had been violated on April 14, 1997 and June 30, 1999, respectively, when they filed motions asking the state district court to exclude the allegedly coerced confessions from evidence at trial. While the Plaintiffs may not have known the full extent of their injuries at that time—that is, they may not have known about the alleged cover up or that Defendants allegedly concealed exculpatory evidence—Plaintiffs did know that their constitutional rights had been violated and that they had incurred some damages. They failed to file their complaint for violation of their substantive due process rights within three years of those dates. Therefore, the Defendants are entitled to summary judgment on these claims.

II. MALICIOUS PROSECUTION

Relying upon *Wallace*, Defendants contend that Plaintiffs' Section 1983 claim for malicious prosecution accrued when their detention without legal process ended and their detention pursuant to wrongful institution of legal process began. 127 S. Ct. at 1096. Therefore, Defendants argue that the statute of limitations began to run on May 28, 1996 and July 30, 1996 for Buchner and Wilkins respectively, when magistrate judges bound them over for trial. Defendants' argument is based upon a misreading of *Wallace*, which states that one's *damages* for the tort of malicious prosecution begin when one is detained pursuant to the wrongful institution of legal process. *Id.* However, while one's damages may begin at that point, the claim itself does not accrue at that time. As the Supreme Court unambiguously stated in *Wallace*, a Section 1983 civil rights claim cannot accrue until the plaintiff has a complete cause of action. 127 S. Ct. at 1095. In other words, each element of the claim must be present in order for the statute of limitations to begin to run; the commencement of damages—only one element of the claim—is not enough in itself. The Tenth Circuit Court of Appeals has consistently held that the constitutional tort of malicious prosecution requires the plaintiff to demonstrate that the underlying proceeding terminated in his favor. *See, e.g., Pierce v. Gilchrist*, 359 F.3d 1279, 1294 (10th Cir. 2004) ("The second element in the tort of malicious prosecution is that the original action must have been terminated in favor of the plaintiff."); *Robinson v.*

Maruffi, 895 F.2d 649, 654-55 (10th Cir. 1990) (holding that Section 1983 claim for malicious prosecution accrues when the criminal proceeding has terminated in plaintiff's favor). Other federal circuit courts have reached the same conclusion. *See, e.g., Brummett v. Camble*, 946 F.2d 1178, 1183-84 (5th Cir. 1991) (collecting cases) ("[T]he federal courts have adopted the common law rule that termination of the underlying criminal proceeding in favor of the accused is an essential element of a 1983 malicious prosecution claim."); *Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178, 183-84 (4th Cir. 1996). Indeed, in *Wallace* the Supreme Court expressly recognized that "an element of [malicious prosecution] is the favorable termination of criminal proceedings."[1] 127 S. Ct. at 1097. Furthermore, the elements of the tort have not changed in the aftermath of the *Wallace* opinion. *See, e.g., Novitsky v. City of Aurora*, 491 F.3d 1244, 1258 (10th Cir. 2007); *Meadows v. Whetsel*, 227 Fed. Appx. 769, 772, 2007 WL 1475279 (10th Cir. May 22, 2007) (continuing to require favorable termination of criminal charges before malicious prosecution claim matures). Furthermore, it has long been the rule in the Tenth Circuit and other circuits that a malicious prosecution claim cannot accrue until the element of favorable termination has been satisfied. *See, e.g.,*

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[1] However, in *Wallace* the Supreme Court also observed that it had never "explored the contours of a Fourth Amendment malicious prosecution suit under § 1983" and declined to do so in that case. 127 S. Ct. at 1096 n. 2.

Robinson v. Maruffi, 895 F.2d 649, 654-55 (10th Cir.1990); *Brummett v. Camble*, 946 F.2d 1178, 1184 (5th Cir. 1991) (collecting cases). If the rule were otherwise, plaintiffs would be forced to file their malicious prosecution claim before they knew they had a complete cause of action, a result that makes little sense. Thus, until a favorable termination occurred, Plaintiffs' claims for malicious prosecution under Section 1983 would have been subject to dismissal under Rule 12(b)(6). Thus, Plaintiffs did not have a complete and present cause of action upon which they could bring suit until the criminal prosecutions against them terminated in their favor. Those dates are January 3, 2001 for Buchner and March 2, 2001 for Wilkins, the dates upon which the prosecutor in their respective cases filed a nolle prosequi indicating they were dropping the charges.[2] Thus, the statute of limitations began to run on those dates, and Plaintiffs' claims for malicious prosecution are timely.

Defendants argue that the element of "favorable termination is not required where there has never been a conviction." Doc. No. 304 at p. 10. Defendants cite no authority directly on point for this proposition,

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[2] Defendants argue that the filing of a nolle prosequi does not constitute a "favorable termination" for a criminal defendant. This Court addressed that issue at pages 49-50 of its August 16, 2006 Memorandum Opinion and Order. Perceiving nothing in Defendants' argument that would change its opinion on that question for the reasons expressed in its previous opinion the Court stands by its original conclusion that a nolle prosequi does constitute favorable termination for a defendant.

which certainly has no basis in the elements of the tort as described by the Tenth Circuit. Instead, Defendants argue that *Heck v. Humphrey* "is not to the contrary." *Id.* In *Heck*, 512 U.S. 477 (1994), the Supreme Court held that where a Section 1983 plaintiff has been convicted and is challenging the prosecution leading to that conviction, a malicious prosecution claim (or a claim analogous to a malicious prosecution claim) does not mature until the conviction has been invalidated. *Id.* at 486-87. To be sure, *Heck* prohibits the entry of a civil judgment that would conflict with an existing criminal conviction. However, that is a far cry from *requiring* a conviction as an element of malicious prosecution under Section 1983. *Heck* certainly does not go that far. Defendants contend that in their *Heck* concurrence, Justices Souter, Blackmun, Stevens, and O'Connor "argued" that the better analogy in *Heck* was to abuse of process, a common law tort that does not require a favorable termination. Doc. No. 304 at p. 10. The concurrence, authored by Justice Souter, does not contain such an argument. *Id.* at 496. Instead, it merely points out the danger of relying solely upon the common law, exclusive of statutory interpretation, in order to inform one's analysis of constitutional torts under Section 1983. *Id.* at 494-95. Justice Souter wrote:

> *Neither [malicious prosecution or abuse of process]*, however, precisely matches the statutory § 1983 claim for damages for unlawful conviction or confinement; and, *depending on the nature of the underlying right* alleged to have been violated (consider, for

> example, the right not to be selected for prosecution solely because of one's race), the tort of abuse of process *might* provide a better analogy to a § 1983 claim for unconstitutional conviction or confinement than the malicious-prosecution tort.

Id. at 495 n. 2 (emphasis added). Defendants' brief to this Court contains no explanation why, under the circumstances of this case, the tort of abuse of process provides a better common law analogy for Plaintiffs' constitutional claims. Furthermore, Justice Souter's concurrence in *Heck* acknowledges that the favorable termination requirement helps to "avoid[ ] the knotty statute-of-limitations problem that arises if federal courts dismiss § 1983 suits filed before an inmate pursues federal habeas, and . . . it does so without requiring federal courts to stay, and therefore to retain on their dockets, prematurely filed § 1983 suits." *Id.* at 499. Ultimately, the concurring justices agreed with the inclusion of the element of favorable termination, reading the majority opinion to say that "prison inmates seeking § 1983 damages in federal court for unconstitutional conviction *or confinement* must satisfy a requirement analogous to the malicious prosecution tort's favorable termination requirement." *Id.* at 500 (emphasis added). This falls far short of applying the favorable termination element only where there has been a conviction.

In addition, the Tenth Circuit has declined to hold that the element of favorable termination does not apply when there has never been a conviction. To

the contrary, in *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 560 (10th cir. 1999), the court found that Beck's claims for malicious prosecution arising from an alleged rape were ripe when the rape charges against him were dismissed—in other words, when he received a pre-conviction favorable termination. Defendants urge this Court to ignore *Beck*, arguing that it was overruled by *Wallace*. The Court agrees that *Wallace* overruled certain portions of *Beck's* reasoning, such as its conclusion that some of Beck's claims were precluded by *Heck* because success on those claims would imply the invalidity of a *future* conviction. However, *Wallace* did nothing to impugn the Tenth Circuit's conclusion that a plaintiff's malicious prosecution claim accrues when the prosecutor dismisses charges against him, resulting in a termination of criminal proceedings that is favorable to the accused. Indeed, the Tenth Circuit recognized that fact once again in *Meadows v. Whetsel*, 227 Fed. Appx. 769, 772 (10th Cir. May 22, 2007), a post-*Wallace* decision. Although the Court makes explicit reference to *Wallace* and discusses its holding, *see id.*, in *Meadows* the Tenth Circuit also cites *Beck* with approval for the principle that a malicious prosecution claim does not mature until the criminal charges have been dismissed before a conviction ever takes place. *Id.* (citing *Beck*, 195 F.3d at 560). In other words, this Court has no reason to believe that either the Supreme Court or the Tenth Circuit would apply the element of favorable termination only where the malicious prosecution plaintiff has been previously convicted.

The Court also disagrees with Defendants' contention that the Tenth Circuit's decision in *Smith v. Gonzales*, 222 F.3d 1220, 1222 (10th Cir. 2000) dictates that Plaintiffs' cause of action accrued when they learned that Nieto's allegedly coerced statements were being used against them. Defendants appear to argue that under *Smith*, a claim for malicious prosecution always accrues before the filing of a nolle prosequis. Defendants' argument is misplaced. In *Smith*, the plaintiff asserted unspecified constitutional claims under Section 1983 arising from an alleged conspiracy among state actors to withhold exculpatory evidence in his criminal trial. *Id.* at 1221. In fact, Smith had three trials: the first resulted in a hung jury, while the second resulted in a conviction. *Id.* Smith then filed a successful federal habeas action, in which the Tenth Circuit found that the prosecution had failed to fulfill its obligation to disclose exculpatory evidence. *Id.* The circuit court vacated Smith's conviction and on remand instructed the federal district court to enter an order directing the State of New Mexico to either grant Smith a new trial or, in the alternative, to order his permanent release from custody. *Id.* Consequently, the State of New Mexico granted Smith a new trial and tried him for a third time, resulting in yet another hung jury. *Id.* Shortly thereafter, the New Mexico state prosecutor filed a nolle prosequi in Smith's case. *Id.* Several years later, Smith filed his civil lawsuit, *Id.*

The *Smith* opinion is of little value here because the Tenth Circuit did not consider the questions at

the heart of the statute of limitations defense in this case—that is, when did Smith have a complete and present cause of action for malicious prosecution, and at what point did Smith achieve a favorable termination of the criminal proceedings against him.[3] Instead, in *Smith* the Court addressed only the question raised by *Heck* (as interpreted by the Tenth Circuit at that time in *Beck*): at what point would success on Smith's unspecified civil constitutional claims no longer demonstrate the invalidity of his existing or future criminal conviction, such that he could pursue those claims under *Heck* and *Beck*? While that was an interesting question under the unique facts in *Smith*, it is not the question before the Court now. Under *Wallace*, this Court must first determine when Plaintiffs had a complete and present cause of action for malicious prosecution. Indeed, this Court need not even reach the issue of applying *Heck* because it has concluded that Plaintiffs' cause of action was incomplete until the filing of the nolle prosequis in their criminal cases. Because their claims for malicious prosecution did not accrue until that time, there was no possible conflict with *Heck*, and there is no need for analysis of that issue.

Even if the analysis of *Smith* did apply here—a proposition with which the Court does not agree because *Smith* apparently did not involve a claim for

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[3] Indeed, it is not clear that Smith even asserted a malicious prosecution claim.

malicious prosecution—it would not change the outcome of the statute of limitations analysis under the facts of this case. The *Smith* court concluded that the statute of limitations on Smith's civil rights claims began to run when it invalidated the final judgment in Smith's state criminal trial by vacating his conviction and remanding his habeas case to the district court. 222 F.3d at 1222. The court's reasoning was twofold. First, it pointed out that as of the date that it vacated Smith's conviction, there remained no conviction to be impugned by a successful Section 1983 lawsuit. *Id.* Second, the court reasoned that when it ruled that the government had unlawfully withheld exculpatory evidence, it had effectively prevented a repetition of the same constitutional violations that had occurred at Smith's second trial, and therefore "a third trial necessarily could not have implicated the constitutional violations as issue in Smith's second trial." *Id.* Under the facts of this case, the nearest analogy is the date upon which the New Mexico Supreme Court refused to grant certiorari on the State's appeal of the New Mexico Supreme Court's decision affirming the district court's ruling excluding Nieto's allegedly coerced statements. Those dates are May 25, 2000 for Buchner, and May 2, 2000 for Wilkins, and from that point on, one could argue that the civil rights violations that allegedly occurred at their respective trials (in the form of the improper admission of evidence) could not be repeated at any subsequent trial. Accordingly, the statute of limitations would begin to run on those dates. However, even using that logic, Plaintiffs' claims in this case

are still timely, as they filed their complaint on August 8, 2002.

In short, the Court concludes that Plaintiffs' constitutional claims for malicious prosecution are timely because they filed their complaint within three years of the filing of the nolle prosequis, at which time they achieved a favorable termination and they had a complete and present cause of action. In accordance with the foregoing,

IT IS HEREBY ORDERED that the Motion by Defendants Fenner and Jacoby for summary judgment as to liability [Doc. No. 164] should be **GRANTED** as to Plaintiffs' claims for violation of their substantive due process rights (Count I) on the grounds that Plaintiffs' claims failed to satisfy the statute of limitations. This Court's previous ruling on the motion remains unchanged in all other respects.

/s/ Judith C. Herrera
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SHAUN WILKINS and
ROY BUCHNER,

Plaintiffs,

vs.

DETECTIVE JUAN DE REYES, Albuquerque Police Dept.; AGENT FRANK JACOBY, New Mexico Dept. of Public Safety; SARGENT [sic] **MICHAEL FENNER, New Mexico Dept. of Public Safety,**

Defendants.

CIV. No. 02-980 JH/RLP

PARTIAL SUMMARY JUDGMENT

(Filed Feb. 13, 2008)

Having granted in part Defendants Fenner's and Jacoby's motion for summary judgment as to liability [Doc. No. 164] by a Supplemental Memorandum Opinion and Order entered contemporaneously with this Partial Summary Judgment,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that partial summary judgment is entered in favor of Defendants on Plaintiffs claim for

violation of substantive due process rights (Count I), and that claim is dismissed with prejudice.

/s/ Judith C. Herrera
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SHAUN WILKINS;
ROY BUCHNER,

Plaintiffs-Appellees,

v.

DETECTIVE JUAN DE REYES, Albuquerque Police Department; AGENT FRANK JACOBY, New Mexico Department of Public Safety; SERGEANT MICHAEL FENNER, New Mexico Department of Public Safety,

Defendants-Appellants.

Nos. 06-2245 & 06-2260

(D.C. No. CIV-02-980-JH-RLP)

ORDER

Filed December 7, 2007

Before **TACHA**, **McKAY**, and **TYMKOVICH**, Circuit Judges.

On September 5,2007, we directed the parties to file supplemental briefs regarding the impact of the Supreme Court's statute of limitations decision in *Wallace v. Kato*, 127 S. Ct. 1091 (2007). We have studied the appeal in light of that opinion. It appears

the decision may affect the district court's conclusions on one or both of plaintiffs' claims.

Our study, and the dictates of judicial economy generally, compel us to direct a limited remand. On remand, the district court should consider the impact of the *Wallace* decision on plaintiffs' (1) substantive due process claim, and (2) malicious prosecution claim. The court shall, within 90 days of the date of this order, file a supplement to the order issued originally on August 16, 2006. The parties shall ensure that a copy of that order is forwarded to this court as soon as it issues. On this limited remand, the district court may direct any and all proceedings or briefing appropriate to allowing full consideration of the *Wallace* decision. This matter is abated pending the district court's consideration.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER
Clerk of Court

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SHAUN WILKINS and ROY BUCHNER,

Plaintiffs,

vs.

DETECTIVE JUAN DE REYES, Albuquerque Police Dept.; AGENT FRANK JACOBY, New Mexico Dept. of Public Safety; SARGENT [sic] **MICHAEL FENNER, New Mexico Dept. of Public Safety,**

Defendants.

CIV. No. 02-980 JH/RLP

MEMORANDUM OPINION AND ORDER

(Filed Aug. 16, 2006)

This matter comes before the Court on the following pending motions: (1) Plaintiffs' motion for leave to supplement response to Defendants' motion to dismiss [Doc. No. 97]; (2) Motion by Defendants Fenner and Jacoby for partial summary judgment as to damages [Doc. No. 162]; (3) Motion by Defendants Fenner and Jacoby for summary judgment as to liability [Doc. No. 164]; (4) Motion by Defendant DeReyes for summary judgment on grounds of qualified immunity [Doc. No. 166]; (5) Motion by Defendants Jacoby and Fenner for order appointing special master and lifting stay [Doc. No. 247]; (6) Motion by

Defendants Fenner and Jacoby for admission of polygraph evidence from experts hired by Plaintiffs [Doc. No. 279]; and (7) Plaintiffs' unopposed motion for extension of time [Doc. No. 281]. After reviewing the briefs and the relevant authorities, the Court concludes that Defendants' motion for partial summary judgment on damages should be granted in part and denied in part, Defendants' motion for summary judgment as to liability should be granted in part and denied in part, Defendants' motion for summary judgment on grounds of qualified immunity should be granted in part and denied in part, and Defendants' motion for admission of polygraph evidence should be denied. Defendants' motion for appointment of a special master should be denied. Plaintiffs' motion for leave to supplement their response to the motion to dismiss should be denied as moot, and Plaintiffs' motion for an extension of time to respond should be granted.

LEGAL STANDARD

Summary judgment generally is appropriate when a court determines that "'there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law.'" *Thrasher v. B & B Chem. Co.*, 2 F.3d 995, 996 (10th Cir. 1993) (citation omitted). Under Rule 56(c), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Rather, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

To carry its initial burden, the moving party need not negate the nonmoving party's claim. *See Allen v. Muskogee, Okl.*, 119 F.3d 837, 840 (10th Cir. 1997), *cert. denied sub nom. Smith v. Allen*, 522 U.S. 1148 (1998). "'Instead, the movant only bears the initial burden of 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.'" *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once the moving party meets its burden, the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). A plaintiff cannot rely upon conclusory allegations or contentions of counsel to defeat summary judgment but rather must produce some specific factual support of its claim. *See Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988); *Fritzsche v. Albuquerque Mun. Sch. Dist.*, 194 F. Supp. 2d 1194, 1206 (D.N.M. 2002). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). Upon a motion for summary

judgment, a court "must view the facts in the light most favorable to the nonmovant and allow the nonmovant the benefit of all reasonable inferences to be drawn from the evidence." *Kaus v. Standard Ins. Co.*, 985 F. Supp 1277, 1281 (D. Kan. 1997), *aff'd*, 162 F.3d 1173 (10th Cir. 1998). If there is no genuine issue of material fact in dispute, then a court must next determine whether the movant is entitled to judgment in its favor as a matter of law. *See, e.g., Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996); *Celotex*, 477 U.S. at 322.

The standard for analyzing a motion for summary judgment shifts slightly if, as here, a defendant raises qualified immunity as a defense in a lawsuit brought under 42 U.S.C. § 1983. Qualified immunity bars Section 1983 suits against defendants in their individual—but not official—capacities. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (citations omitted). The qualified immunity defense was created to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). It provides immunity from suit and not merely from liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It therefore spares defendants the burden of going forward with trial. *See Wilson v. Meeks*, 52 F.3d 1547, 1552 (10th Cir. 1995), *abrogated on other grounds, Saucier v. Katz*, 533 U.S. 194 (2001).

Once a moving party raises the defense of qualified immunity, the nonmoving party must (1) assert

facts which, if true, would constitute a violation of a constitutional right, and (2) demonstrate that the "right was clearly established at the time such that a reasonable person in the [movant's] position would have known that [the] conduct violated the right." *Garramone v. Romo,* 94 F.3d 1446, 1449 (10th Cir. 1996) (citations omitted); *see also, e.g., Saucier v. Katz,* 533 U.S. 194, 201-02 (2001). The first part of this inquiry requires a court to determine whether the parties' submissions, viewed in the light most favorable to the plaintiff, could show the officers' conduct violated a constitutional right. *Cf. id.* at 201. The second part of the inquiry requires a court to "assess[ ] the objective legal reasonableness of the action at the time of the alleged violation and ask[ ] whether 'the right was sufficiently clear that a reasonable officer would understand that what he [or she was] doing violates that right.'" *See Medina v. Cram,* 252 F.3d 1124, 1128 (10th Cir. 2001) (quotation omitted); *Anderson v. Creighton,* 483 U.S. 635, 639 (1987) (citations omitted).

If a nonmoving party fails to satisfy its two-part burden, a court must grant the moving party qualified immunity. *See Medina,* 252 F.3d at 1128. If, and only if, the plaintiff establishes both elements of the qualified immunity test does a defendant then bear the traditional burden of showing "'that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law.'" *Nelson v. McMullen,* 207 F.3d 1202, 1206 (10th Cir. 2000) (quoting *Albright v. Rodriguez,* 51 F.3d 1531, 1535

(10th Cir. 1995)). In other words, although the court "review[s] the evidence in the light most favorable to the nonmoving party, the record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity." *Medina,* 252 F.3d at 1128 (citation omitted). However, if the nonmoving party successfully demonstrates the violation of a clearly established right, the moving party assumes the normal summary judgment burden of demonstrating that no genuine issue of material fact exists that would defeat its claim for qualified immunity. *See Woodward v. City of Worland,* 977 F.2d 1392, 1396-97 (10th Cir. 1992) (citations omitted).

BACKGROUND

The facts of this case, viewed in the light most favorable to the Plaintiffs, are as follows. At the time of the events in question, Defendant Juan DeReyes ("DeReyes") was a detective with the Albuquerque Police Department's Gang Unit. Defendants Frank Jacoby ("Jacoby") and Michael Fenner ("Fenner") were employed by the New Mexico State Police Department at all relevant times.

On April 14, 1996, Ben Anaya, Sr., found the bodies of his son, Ben Anaya, Jr., his girlfriend, Cassandra Sedillo, and her two young sons, Johnny and Matthew Garcia, at Ben Sr.'s cabin in Torreon, New Mexico. Forensic analysis revealed that the two adults had been shot to death approximately four

months earlier, in mid-December of 2005, and that the two children had been locked in the cabin and had died of starvation and dehydration two to three weeks after the adults. At the request of the local district attorney, the New Mexico State Police assumed responsibility for the quadruple homicide investigation. Accordingly, Jacoby and Fenner became involved in the case. When law enforcement officials realized that Ben Anaya, Jr. had been a member of Albuquerque's "18th Street Gang," they began to suspect that the murders were gang-related and asked for assistance from the Albuquerque Police Department's Gang Unit. At that point, DeReyes became involved in the investigation. Neither Jacoby nor Fenner had met DeReyes before that time.

Ben Anaya, Sr. had last seen his son alive on December 10, 1995 at the cabin in Torreon, where Ben Jr. was hiding out from law enforcement. Also staying at the cabin in December of 1995 were Cassandra Sedillo and her two little boys, as well as Ben's friend and fellow 18th Street gang member Shawn Popeleski ("Popeleski"), also known as "Frank Gomez" and "Popcorn." On April 15 and April 17, 1996, Jacoby and DeReyes interviewed Popeleski regarding the murders. On April 17 and April 18, respectively, they interviewed two other members of the 18th Street gang, Lawrence Nieto ("Nieto"), also known as "Woody," and Shaun Wilkins ("Wilkins"), also known as "Sagger." In May of 1996, Defendants conducted further interviews of Popeleski and Nieto. The stories that Popeleski and Nieto told the police

changed significantly over time, and Plaintiffs contend that their final stories were the result of coercion by the Defendants.[1]

In his initial interviews, Nieto denied ever being present at the Torreon cabin or knowing anything about the murders. However, in subsequent interviews by Defendants, Nieto's story underwent several significant changes. In an interview[2] on May 15, 1996, Nieto related the following description of events to Eric Lucero, a polygrapher with the New Mexico State Police. Nieto stated that in December of 1998 [sic], he had been at home when Wilkins and his friend Roy Buchner ("Buchner"), also known as "Easy," came to his house and convinced him to accompany them to the Torreon cabin in a black Trans Am. Nieto also said that he could see that Wilkins had a chrome plated .22 caliber semiautomatic pistol in his lap. On the way there, Wilkins and Buchner said that they planned to shoot Popeleski because he was a snitch. They arrived to find Popeleski at the cabin, along with Ben Anaya, Cassandra Sedillo, and the two children. According to Nieto, Wilkins and Buchner snorted cocaine with Anaya while he smoked pot and drank beer with Popeleski. Nieto said that Wilkins "got kind of crazy" after taking cocaine and urged him

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[1] These interviews are discussed in further detail in the discussion of qualified immunity in Section III, *infra*.

[2] At the time of this interview, Nieto was in police custody as a material witness in Santa Fe, New Mexico. He had not yet been charged with a crime.

to shoot Popeleski. Nieto also stated that while Anaya was showing Wilkins and Buchner his guns, he informed Popeleski that Wilkins and Buchner wanted to shoot him, and that Popeleski should watch his back. Three or four hours later, Nieto, Wilkins and Buchner left the cabin, and at that time Wilkins said that they were going to "blast Popcorn" as well as steal the drugs and guns belonging to Anaya. Nieto said that when he expressed reluctance to participate, the other two told him that he would wear a mask to hide his identity. When they reached the car, all three donned masks, and Nieto was given a .12 gauge shotgun. Wilkins and Buchner were armed with a pistol and a rifle. The three waited for thirty minutes to an hour and then walked back to the cabin, where they spotted Popeleski outside relieving himself. Under Wilkins' orders, Nieto snuck up on Popeleski and held him at gunpoint. Nieto admitted that he held Popeleski to the ground and told him not to worry, that he would not shoot him. In the meantime, Wilkins and Buchner entered the cabin wearing ski masks, and Nieto heard approximately eight shots fired. According to Nieto, he then fired his shotgun in the air and told Popeleski to run. Nieto then saw Wilkins and Buchner carrying guns, cocaine, and marijuana out of the cabin. The three walked to the car, but Buchner ran back to the cabin and locked the front door. On the drive back to Albuquerque, Wilkins and Buchner laughed and said that there had been no witnesses. They stopped and burned their gloves in a trash can, warned Nieto not to say anything, and then dropped him off at home. Plaintiffs contend that

Nieto's story was the product of coercion, and that Defendants pressured Nieto to fabricate his statement after coercing a similar account from Popeleski.

Eventually, based upon statements by Popeleski and Nieto, the Defendants theorized that Wilkins and his friend and fellow 18th Street gang member Buchner, were directly involved in the homicides, along with Nieto and Popeleski. The Torrance County Magistrate Court conducted preliminary hearings for Plaintiffs Wilkins and Buchner. DeReyes testified at Buchner's preliminary hearing, while Jacoby testified at Wilkins' preliminary hearing. Popeleski testified at both Plaintiffs' preliminary hearings as well, while Nieto testified at neither hearing. Both Buchner and Wilkins were represented by counsel at their preliminary hearings. The magistrate found that probable cause existed and bound both Wilkins and Buchner over for trial. Eventually, all four of the 18th Street gang members (Nieto, Popeleski, Wilkins, and Buchner) were tried separately for the murders.

At his own criminal trial which began on July 23, 1997, Nieto testified in a manner consistent with his May 15, 1996 interview in which he accused Wilkins and Buchner of being the "trigger men" who shot Ben Anaya and Cassandra Sedillo and who then locked the children in the cabin, while he and Popeleski were present outside. Nieto was convicted for his part in the homicides and received four consecutive life sentences.

In August of 1999, Popeleski went to trial for the murders. He did not testify in his own defense, but in her opening statement his attorney did tell the jury that Popeleski had been truthful in his statements to the police. The jury convicted Popeleski of allowing the children to starve to death and the robbery of Ben Anaya's automobile. He received a sixteen and one half year sentence. On September 22, 1997, Plaintiff Wilkins went to trial on the murder charges in state district court. Nieto refused to testify, and therefore his May 15, 1996 videotaped statement was played to the jury. Popeleski also refused to testify, and so his preliminary hearing testimony was played to the jury. The jury could not reach a verdict, and the court declared a mistrial. On November 3, 1997, Plaintiff Buchner went to trial for all four murders as well. Nieto again refused to testify, but not before he told the jury that Defendants had forced him to say that he, Wilkins, and Buchner had been at the Torreon cabin. He also asserted that none of them had any part in the murders. The trial court declared Nieto unavailable to testify and admitted his May 15, 1996 videotaped statement into evidence. Popeleski also refused to testify, and so his preliminary hearing testimony was admitted into evidence. Similarly, Buchner's jury could not reach a unanimous verdict, and the court declared a mistrial.

The state initially decided to retry both men. Buchner then filed motions in limine to exclude Nieto's and Popeleski's statements at trial. The district court ruled that Nieto's May 15, 1996 videotape could not be

admitted but that Popeleski's preliminary hearing testimony would be admitted at trial. The State appealed, and the New Mexico Court of Appeals held that the district court had to analyze each particular statement made by Nieto to determine its admissibility. The state district court conducted that analysis, excluding most of Nieto's May 15, 1996 statement. The State appealed this decision, and on March 21, 2000, the New Mexico Court of Appeals affirmed. On May 25, 2000, the New Mexico Supreme Court denied certiorari. In Wilkins' case, the state district court ruled that Nieto's statement could not be admitted at the second trial. The State appealed, and on November 4, 1999, the Court of Appeals affirmed the state district court. On May 2, 2000, the Supreme Court denied certiorari.

On January 1, 2001, a new District Attorney took office in New Mexico's Seventh Judicial District. He entered *nolle proseques* in Buchner's and Wilkins' criminal cases on January 3, 2001 and March 2, 2001, respectively. On August 8, 2002, Plaintiffs filed this lawsuit under 42 U.S.C. § 1983 asserting that Defendants violated their federal civil rights. In Count I of the Complaint, Plaintiffs allege that Defendants coerced Popeleski and Nieto into falsely naming them as the killers, thereby violating Plaintiffs' Fourth Amendment rights to be free from unlawful seizure, their liberty interest under the Fifth Amendment, their rights to a fair trial, and their Fifth and Fourteenth Amendment due process rights. Under Count II, Plaintiffs allege that Defendants are liable for

malicious prosecution. Because it is not clear whether Plaintiffs allege a state common law tort or a constitutional tort, the Court presumes that they are alleging both causes of action. Finally, in Count III Plaintiffs allege that Defendants engaged in a conspiracy to violate their civil rights.

DISCUSSION

I. FENNER AND JACOBY'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY [DOC. NO. 164][3]

A. Statute of limitations

Defendants Jacoby and Fenner argue that Plaintiffs' claims should be dismissed because they failed to satisfy the statute of limitations. Examination of this argument reveals it to be without merit.

"State statutes of limitations applicable to general personal injury claims supply the limitations periods for § 1983 claims. . . ." *Beck v. City of Muskogee Police Dep't,* 195 F.3d 553, 557 (10th Cir. 1999). In this case, the parties agree that New Mexico's three-year personal injury statute of limitations, NMSA 1978 § 37-1-8 (1880), applies to Plaintiffs' claims. However, it is well settled that federal law governs the accrual time for Section 1983 claims. *Id.* The parties disagree as to the date when Plaintiffs' causes of action accrued.

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[3] Defendant DeReyes joins in the motion. *See* Doc. No. 243.

Relying upon the principle that Section 1983 actions accrue when plaintiffs knew or had reason to know of the existence and cause of the injury which is the basis for their lawsuit, *see Smith v. City of Enid, Okla.*, 149 F.3d 1151, 1154 (10th Cir. 1998) *and Johnson v. Johnson County Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991), Defendants contend that Plaintiffs' claims accrued when they learned of Nieto's May 11, 1996 interview in which he accused them of committing the Torreon cabin murders, accusations that Plaintiffs claim Defendants coerced from Nieto. Defendants contend that as to Buchner, this date is April 14, 1997, when his criminal attorney filed a motion asking the state district court to consider a videotape of that interview in determining whether to admit evidence of Nieto's later statement to Agent Lucero. Defendants further contend that Wilkins' claim arose on June 30, 1999, when his criminal attorney filed a motion seeking to cross examine officers regarding the contents of Nieto's May 11, 1996, interview. Both of these dates fall outside the limitations period, since they are more than three years prior to the filing of the civil complaint on August 8, 2002. In contrast, Plaintiffs contend that the statute of limitations began to run much later, either when the New Mexico Court of Appeals affirmed the district court's exclusion of Nieto's statements, or when the prosecutor entered *nolle proseques* as to both Plaintiffs. Both of these dates fall within the limitations period.

The Court agrees with Plaintiffs, finding this case to be controlled *by Heck v. Humphrey* and later opinions from the Tenth Circuit Court of Appeals applying *Heck*'s principles. In *Heck,* the plaintiff appealed his Indiana criminal conviction. While the appeal was pending, he filed a civil lawsuit under 42 U.S.C. § 1983, seeking damages on the claim that the defendants, acting under color of state law, had engaged in unlawful acts that had led to his arrest and conviction. The defendants argued that the statute of limitations barred his claims. The Supreme Court held that when a state prisoner seeks damages in a Section 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence. *Heck v. Humphrey,* 512 U.S. 477, 487 (1994). If it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Id.* This is not a matter of exhaustion of state remedies prior to asserting a federal right; rather, under *Heck* the Section 1983 cause of action simply does not exist until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus. *Id.* at 489. The Court explained its rationale as follows:

> One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused. This requirement avoids parallel litigation over the issues of probable cause and guilt, and it precludes

> the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction. Furthermore, to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit.

Id. at 484 (internal citations and quotations omitted). The Supreme Court grounded its decision in the "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," *id.* at 486, as well as traditional, common law tort principles. The Supreme Court did not root its analysis in the specific elements of any particular cause of action under the tort laws of any one state, as Defendants urge this Court do here. *See Pierce v. Gilchrist,* 359 F.3d 1279, 1289 (10th Cir. 2004) ("*Heck* thus teaches that federal courts fashioning constitutional analogues to traditional common law torts should refer to the general common law tradition, rather than to the law as defined by the jurisdiction where the action originated.").

In this case, there is no doubt that during the pendency of the criminal charges against them, a victory by Plaintiffs on their claims for violation of constitutional rights, malicious prosecution without probable cause, and conspiracy would have been

entirely inconsistent with any possible future criminal conviction of the Plaintiffs, as each of their civil claims rests on the premise that Defendants manufactured the criminal charges against them through coercion of Nieto and Popeleski. Therefore, it appears that under *Heck,* Plaintiffs' claims did not accrue until the conclusion of their criminal proceedings. However, Defendants contend that *Heck* does not apply in this instance because Plaintiffs were never convicted, and therefore there was no actual conviction or sentence to be reversed, invalidated, or expunged.

Defendants' position is based upon a misreading of *Heck.* It is true that *Heck* directly addresses those situations in which a Section 1983 plaintiff has been convicted and incarcerated, rather than those in which a Section 1983 plaintiff wishes to sue during the pendency of his criminal trial, appeal, or state habeas action. However, in dicta the Supreme Court indicated that it would not be appropriate to proceed with a civil rights case while a defendant was awaiting the final disposition of the criminal case against him. *Id.* at 487 n. 8 ("For example, if a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention [is] an appropriate response to the parallel state-court proceedings."). Furthermore, the rationale underlying *Heck* is to prevent parallel civil and criminal litigation over the issues of probable cause and guilt, as well as the inconsistent results on those issues that may result from such

parallel litigation. That rationale applies with equal force while the criminal prosecution is still pending. This logic has led the Tenth Circuit to conclude that "*Heck* should apply to such situations when the concerns underlying *Heck* exist. Thus, *Heck* precludes § 1983 claims relating to pending charges when a judgment in favor of the plaintiff would necessarily imply the invalidity of any conviction or sentence that might result from prosecution of the pending charges. Such claims arise at the time the charges are dismissed." *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553, 557 (10th Cir. 1999) (citations omitted). Similarly, the Sixth Circuit Court of Appeals has directly addressed this issue in the exact context presented here, where a Section 1983 action, if successful, would imply the invalidity of a *future* conviction on a pending criminal charge. In *Shamaeizadeh v. Cunigan,* 182 F.3d 391 (6th Cir. 1999), the court found that "the concerns of *Heck* apply pre-conviction as well as post-conviction." *Id.* at 398. Thus, a plaintiff cannot "bring an action seeking damages related to the criminal proceeding brought against him until a disposition in that proceeding ha[s] been reached." *Id.* at 398-99. Indeed, the statute of limitations does not even begin to run for criminal defendants seeking to file Section 1983 claims until the disposition of any pending criminal proceedings. *Id.* at 399. Similarly, several other circuit courts of appeals have applied *Heck* to both pending and dismissed charges. *See Covington v. City of New York,* 171 F.3d 117, 122 (2d Cir. 1999); *Washington v. Summerville,* 127 F.3d 552,

555-56 (7th Cir. 1997); *Smith v. Holtz*, 87 F.3d 108, 112-13 (3d Cir. 1996).

The Tenth Circuit's opinion in *Smith v. Gonzales*, 222 F.3d 1220 (10th Cir. 2000), upon which Defendants rely, does not alter the analysis. In that case, the State of New Mexico tried Smith for the kidnaping and murder of two women. The jury hung and the trial court declared a mistrial. The following year, a second jury acquitted Smith of the kidnaping charges but convicted him of two counts of first degree murder. On appeal, the New Mexico Supreme Court affirmed both convictions. Smith then filed a motion for post-conviction relief in the state trial court claiming that the prosecution improperly had failed to disclose exculpatory evidence. The trial court denied his motion, and Smith filed a state petition for a writ of habeas corpus, which the state trial court summarily dismissed. The New Mexico Supreme Court denied appellate review. Next, Smith filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, which the federal district court dismissed. Smith appealed, and the Tenth Circuit held that the prosecution had failed to disclose several pieces of relevant material exculpatory evidence, thereby violating Smith's constitutional due process right to a fair trial. The Tenth Circuit vacated Smith's conviction and remanded the case to the district court. *Id.* at 1221. The Tenth Circuit instructed the district court on remand to enter an order directing the State of New Mexico to either grant Smith a new trial or, in the alternative, to order his permanent

release from custody. As a result, the State of New Mexico granted Smith a new trial and tried him for a third time. The jury could not reach a unanimous verdict, and the trial court once again declared a mistrial. *Id.* New Mexico state prosecutors filed a *nolle prosequi* indicating that they would not prosecute Smith's case further, and the State released Smith from prison on the same day. Almost three years later, Smith filed a Section 1983 action.

The question raised by this procedural marathon was when Smith's constitutional claims accrued for purposes of the statute of limitations. Relying on *Heck* and *Beck*, the Tenth Circuit concluded that Smith's claim accrued when it invalidated the final judgment in Smith's state criminal trial, vacated his conviction, and remanded the habeas case to the district court. *Id.* at 1222. The court reasoned that, as of that date, Smith's civil lawsuit would not have demonstrated the invalidity of the state conviction because the Tenth Circuit had just vacated that conviction. *Id.* As to the remaining *pending* criminal claims against Smith, the court reasoned that as a result of its holding on the habeas appeal, the prosecution would be forced to turn over the exculpatory evidence before Smith's third trial, thereby eliminating the constitutional violations at issue in Smith's second trial. *Id.* As a result, a favorable result in Smith's Section 1983 action would not have rendered invalid any future criminal judgment against him. In other words, the court concluded that as of the date of the federal remand, a civil victory for Smith would

not conflict with any past or future criminal conviction. Thus, *Smith* merely applied the principles of *Heck*—which prohibits a Section 1983 action when a judgment in favor of the plaintiff would necessarily imply the invalidity of any conviction or sentence that might result from prosecution of the pending charges—to the unique circumstances of that case. However, *Smith* does nothing to change the fact that, in this case, criminal charges were pending against Plaintiffs until January 3, 2001 (Wilkins) and March 2, 2001 (Buchner), when the prosecutor filed *nolle prosequis* on their charges. Until those dates, a civil judgment in Plaintiffs' favor on the claims they assert in this case would have conflicted with or rendered invalid any possible future state criminal conviction for the murders. Therefore, under *Heck, Beck,* and *Smith,* the dates of filing of the *nolle prosequis* are the dates when Plaintiffs' Section 1983 claims accrued. Accordingly, Plaintiffs have satisfied the statute of limitations.

B. Absolute Immunity

Defendants contend that they are entitled to absolute immunity from Plaintiffs' claims against them. The crux of all of Plaintiffs' claims against Defendants is that they conspired to use improper tactics to coerce Popeleski and Nieto to inculpate Plaintiffs, even though Defendants knew Plaintiffs to be innocent of the murders. It is undisputed that the Defendants participated in the interviews of Popeleski and Nieto, and that DeReyes testified at

Buchner's preliminary hearing. It is also undisputed that Jacoby testified at Wilkins' preliminary hearing, signed criminal complaints against both Wilkins and Buchner, applied for arrest warrants for both Wilkins and Buchner, signed affidavits in support of both arrest warrants, and participated in the interviews of Nieto. The question, then, is whether under the applicable federal laws the Defendants are entitled to absolute immunity for those actions. The Court finds that, with the exception of DeReyes and Jacoby's testimony at preliminary hearings, they are not entitled to such immunity.

Title 42 U.S.C. § 1983 is written in broad terms. It purports to subject "[e]very person" acting under color of state law to liability for depriving any other person in the United States of "rights, privileges, or immunities secured by the Constitution and laws." The Court has consistently recognized, however, that Section 1983 was not meant "to abolish wholesale all common-law immunities." *Pierson v. Ray,* 386 U.S. 547, 554 (1967). The section is to be read "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman,* 424 U.S. 409, 418 (1976). Thus, the initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. *Tower v. Glover,* 467 U.S. 914 (1984). If "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel

against recognizing the same immunity in § 1983 actions." *Id.* at 920. While the Court looks to the common law for guidance, it should "not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form." *Malley v. Briggs,* 475 U.S. 335, 340 (1986).

Absolute immunity applies to the performance of certain functions when those functions are integral to the functioning of our adversarial judicial system. *See Briscoe v. LaHue,* 460 U.S. 325, 345 (1983). This Court is guided by the Supreme Court's admonition limiting the scope of absolute immunity: "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. [The Supreme Court has] been 'quite sparing' in [its] recognition of absolute immunity." *Burns v. Reed,* 500 U.S. 478, 486-87 (1991). The Supreme Court has carefully circumscribed the doctrine of absolute immunity because it protects an official from liability even when the official acted with knowledge of the constitutional violation. *Briscoe,* 460 U.S. at 345. Testimony at adversarial judicial proceedings is the most historically grounded of these functions which merit absolute immunity. *See id.* Accordingly, the Court find [sic] that DeReyes and Jacoby are entitled to absolute immunity only for their testimony at the preliminary hearings held in Plaintiffs' criminal cases.

In concluding that the Defendants are not entitled to absolute immunity for any of their other acts, the Court is guided by the Supreme Court's decision

in *Malley v. Briggs*, 475 U.S. 335 (1986). In *Malley*, a Rhode Island state trooper prepared felony complaints charging plaintiffs with possession of marijuana. The complaints were presented to a state judge, accompanied by arrest warrants and supporting affidavits. The judge signed the warrants and plaintiffs were arrested, but the district attorney dropped the charges when the grand jury did not return an indictment. Plaintiffs then brought a damages action under Section 1983, alleging that the state trooper violated their rights under the Fourth and Fourteenth Amendments by applying for the arrest warrants. The state trooper argued that he should have absolute immunity because his function in seeking an arrest warrant was similar to that of a complaining witness. The Supreme Court rejected this argument, finding no support for it under the common law in place in 1871 or in public policy considerations. *Id.* at 340-41. The court also rejected the state trooper's attempt to draw an analogy between himself and a prosecutor who is absolutely immune from suit for malicious prosecution: "We do not find a comparable tradition of absolute immunity for one whose complaint causes a warrant to issue." *Id.* at 342. Rather, the Supreme Court concluded that in the case of the police officer applying for a warrant, the doctrine of qualified immunity (which was applicable in 1871) would provide adequate protection. *Id.* at 342-43. In light of *Malley*, this Court concludes that Jacoby—the officer who sought and obtained arrest warrants against both Plaintiffs, signed the

criminal complaints against them, and signed supporting affidavits—is not entitled to absolute immunity from suit for those actions.

As for Defendant Fenner, he argues that because he did not testify at either preliminary hearing, did not sign either arrest warrant, and did not sign either complaint, he is "merely an investigative officer entitled to absolute immunity." DeReyes joins in the motion at large and offers no arguments specific to his own actions, but like Fenner he did not sign either warrant or complaint. Accordingly, the Court presumes that the arguments applicable to Fenner apply to DeReyes as well. However, long established federal law holds that police officers doing investigative work, such as the interviews of Nieto and Popeleski, are entitled at most to qualified immunity; absolute immunity simply does not apply to such investigative work.

As the Tenth Circuit has explained,

> State officials are absolutely immune from suit if they perform functions analogous to those of a prosecutor in initiating and pursuing civil and administrative enforcement proceedings. **Absolute immunity does not extend to actions that are primarily investigative** or administrative in nature but, instead, attaches only to actions which a prosecutor must perform while fulfilling his duty as an officer of the court.

Perez v. Ellington, 421 F.3d 1128, 1133 (10th Cir. 2005) (internal citations and quotations omitted)

(emphasis added). *In Perez,* the defendants were tax assessment officials investigating the plaintiffs' possible tax evasion. In conducting their investigation, the defendants issued "jeopardy tax assessments" which gave them access to plaintiffs' financial records. After some preliminary investigation, defendants concluded that illegal conduct had occurred and issued a lien against plaintiffs' property pursuant to the New Mexico Tax Administration Act. Upon completion of their audit, defendants determined that there was nothing illegal about plaintiffs' conduct. However, they did not release the liens on plaintiffs' property until more than a year later. The Tenth Circuit held that the defendants were not entitled to absolute immunity, stating, "As a general proposition, state officials, like Defendants acting in a merely investigatory capacity, are not entitled to absolute immunity." *Id.* at 1133. *(citing Buckley v. Fitzsimmons,* 509 U.S. 259, 273 (1993) ("A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity.")). *See also Rex v. Teeples,* 753 F.2d 840, 843-44 (10th Cir. 1985) (distinguishing between the prosecutor's quasi-judicial role warranting absolute immunity and "police-related" work not accorded such immunity); *Gregory v. City of Louisville,* 444 F.3d 725, 740 (6th Cir. 2006) ("Under the Supreme Court's functional test, the pre-trial investigatory acts by forensic examiners merit no more protection under absolute immunity than do

other persons performing investigatory actions. This Court sees no reason to treat the intentional fabrication of a forensic report differently from the intentional fabrication of a police officer or prosecutor."). Other circuits have reached similar conclusions. *Paine v. City of Lompoc,* 265 F.3d 975, 981 (9th Cir. 2001) (noting that absolute immunity "does not shield non-testimonial conduct. . . . [P]olice officers . . . obviously enjoy no immunity for non-testimonial acts such as fabricating evidence.") (internal quotations and citations omitted); *see Keko v. Hingle,* 318 F.3d 639, 644 (5th Cir. 2003) (declining to extend absolute immunity to a forensic examiner who allegedly falsified a forensic report).

Finally, it is of no import whether the investigative work at issue is performed by a police officer or a prosecutor. Rather, immunity decisions regarding the liability of a state prosecutor depend on "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White,* 484 U.S. 219, 229 (1988). Thus, there is no absolute immunity for the investigative police work (in the form of witness interviews) performed by any of the Defendants in this case.

II. JACOBY AND FENNER'S MOTION TO ADMIT POLYGRAPH EVIDENCE ON SUMMARY JUDGMENT AND AT TRIAL [Doc. No. 279][4]

In this motion, Defendants ask the Court to admit evidence of polygraph tests of Plaintiffs taken during the pendency of the criminal proceedings. In both cases, Plaintiffs took the polygraph examinations at the behest of their attorneys as part of their defenses to the criminal charges, but those examinations were never revealed to the prosecution. However, in this civil case Magistrate Judge Puglisi ordered the Plaintiffs to produce the polygraphs in response to Defendants' discovery requests but subsequently stayed that order. Defendants request that they be permitted to both supplement their dispositive motions with the polygraph evidence and introduce the polygraph evidence at trial. For the reasons stated below, the motion will be denied.

In the past, the Tenth Circuit has indicated that it views polygraph tests with disfavor, at one time even adopting a bright line rule that polygraph tests offered to prove the truthfulness of a declarant are inadmissible. *United States v. Hunter,* 672 F.2d 815, 817 (10th Cir. 1982); *Palmer v. City of Monticello,* 31 F.3d 1499, 1506 (10th Cir. 1994). However, in 1997 the Tenth Circuit held that bright line rule to be defunct; rather, if a party seeks to admit a polygraph

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[4] DeReyes joins in this motion as well. [Doc. No. 280].

test, that party must satisfy the criteria for admission of expert witness testimony under Federal Rules of Evidence 702 and 403, as well as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See United States v. Call*, 129 F.3d 1402, 1404 (10th Cir. 1997).

Federal Rule of Evidence 702 governs the admissibility of scientific expert testimony. The rule requires a determination that the testimony (1) is based on scientific knowledge, and (2) will assist the trier of fact to understand the evidence or to determine a fact in issue. Fed. R. Evid. 702. The second Rule 702 requirement, that the evidence be helpful to the factfinder, is a question of relevance. In *Daubert*, the Supreme Court set forth the framework for analyzing the admissibility of scientific evidence. In addition to the Rule 702's requirements, *Daubert* further requires a determination of whether the proffered scientific evidence is reliable. Under *Daubert*, courts measure reliability of scientific evidence by considering (1) whether the technique can and has been tested; (2) whether the technique has been subjected to peer review; (3) the known or potential error rate of the technique; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique has gained general acceptance in the scientific community. *Id.* at 593-95. This list is nonexhaustive and the inquiry under Rule 702 is "flexible." *Id.* at 594. As the Tenth Circuit pointed out, in addition to satisfying *Daubert*, polygraph evidence must satisfy both Rule 702 and Rule 403,

which permits the district court to exclude evidence where its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." *Call,* 129 F.3d at 1405.

A. Buchner's Polygraph

On October 18, 1996, Dr. David Raskin performed a polygraph test on Buchner. The testing procedure consisted of a pre-test interview, a simulation test, the running of five charts (i.e., Raskin asked each set of questions five times, taking readings for each set) in which four relevant questions were asked, and a post-test interview. With regard to the first relevant question, Buchner denied firing any of the shots that killed Ben Anaya and Cassandra Sedillo, and Raskin opined that Buchner was being truthful. Raskin also asked Buchner if he participated in any way in causing the deaths of Anaya and Sedillo, if he was present at the cabin when they were shot, and if he had ever been to the cabin. Buchner denied all three questions, and Raskin opined that his denials were deceptive.

The Court will not admit the polygraph evidence at trial, nor will it consider the evidence on summary judgment. For purposes of this motion, the Court assumes without deciding that the opinion testimony regarding Buchner's polygraph passes muster under *Daubert.* However, even with that assumption, the Court concludes that the evidence should be excluded

because it does not satisfy Rules 702 and 403 of the Federal Rules of Evidence.

Defendants offer Dr. Raskin's opinion testimony regarding Buchner's polygraph to show that he lied when he said that he did not participate in causing the deaths of Ben Anaya and Cassandra Sedillo, when he said that he was not present at the cabin when they were shot, and when he said that he never went to the Torreon cabin where they were killed. Defendants thus wish to undermine Buchner's credibility when he testified in the past, and presumably will testify in the future, in support of his claims for liability and damages.[5] However, the Tenth Circuit

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[5] Defendants argue that the polygraph examinations are evidence not only of Plaintiffs' credibility, but are also "factual evidence" on the issue of Plaintiffs' alleged emotional injuries because they are "psychological tests" performed on the Plaintiffs akin to the mental examinations performed by the psychologists who will testify [sic] Plaintiffs' emotional distress damages. The Court rejects this contention because the polygraph examinations clearly do not constitute factual evidence of whether Plaintiffs participated in the murders or whether they suffered damages. Rather, it is clear that Defendants offer the opinion testimony on the issue of whether Plaintiffs are telling the truth about their non-participation—that is, evidence of their credibility. Indeed, the United States Supreme Court has already rejected Defendants' argument. *See United States v. Scheffer*, 523 U.S. 303, 317 n. 13 (1998) (emphasizing that polygraph testimony is opinion testimony, not factual evidence). And as one district court has observed, "[t]he [polygraph] evidence is only proof of how the examinee reacted during the test not the event itself. If such evidence has any value, it is as it may bear on the credibility of the examinee." *Chatwin v. Davis County*, 936 F. Supp. 832, 838 (D. Ariz. 1996). However, the

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has said that "[t]he credibility of witnesses is generally not an appropriate subject for expert testimony." *United States v. Toledo,* 985 F.2d 1462, 1470 (10th Cir. 1993). This is because "expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not 'assist the trier of fact' as required by Rule 702." *United States v. Charley,* 189 F.3d 1251, 1267 (10th Cir. 1999) (quoting Rule 702). "A fundamental premise of our criminal trial system is that "the jury is the lie detector." *United States v. Scheffer,* 523 U.S. 303, 313 (1998) (excluding polygraph evidence) (quoting *United States v. Barnard,* 490 F.2d 907, 912 (9th Cir. 1973)); *Call,* 129 F.3d 1402, 1406 (10th Cir. 1997) (testimony concerning credibility, such as polygraph evidence, is "often excluded because it usurps a critical function of the jury and because it is not helpful to the jury, which is capable of making its own determinations regarding credibility."). [6] The Court concludes that, much like the

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Tenth Circuit has cast doubt on the use of polygraph evidence for such a purpose. *United States v. Soundingsides,* 820 F.2d 1232, 1241-42 (10th Cir. 1987); *United States v. Tsosie,* 1993 WL 34780 *5 (10th Cir. Feb. 8, 1993) (admissibility of polygraph evidence is limited to a purpose unrelated to truthfulness) (unpublished).

[6] Defendants contend that these cases do not apply because they are criminal cases. However, the principle that the credibility of a witness is a matter exclusively in the province of the jury applies with equal force in the civil arena. *See Escue v. N. Okla. College,* 450 F.3d 1146, 1158 (10th Cir. 2006) (finding that, with

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excluded evidence in *Call,* the Buchner polygraph would fail to assist the jury as required by Rule 702, but would rather distract them from their essential function of evaluating credibility.

In addition, the Court concludes that the polygraph evidence should be excluded under Rule 403. In *Call* the Tenth Circuit noted that it was appropriate to exclude the polygraph evidence because of the danger that the jury may overvalue it as a result of its scientific nature, 129 F.3d at 1406, and the Court concludes that same hazard is present here. The danger of confusion of the issues and waste of time—important considerations under Rule 403—are particularly strong where, as here, Defendants will have an opportunity to cross-examine the Plaintiffs at trial, giving the jurors a firsthand opportunity to assess Plaintiffs' credibility for themselves. However, introducing polygraph evidence of credibility will merely encourage the jurors to abandon their roles as "lie detectors," in favor of wholesale reliance upon the expert's interpretation of the polygraph. Thus, the evidence should be excluded as more unfairly prejudicial than probative.

The Court notes that in the years since the Supreme Court issued its opinion in *Daubert,* both

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respect to a plaintiff's § 1983 claim, "[i]t is the jury's exclusive province to assess the credibility of witnesses and determine the weight to be given to their testimony.") (quoting *Lamon v. City of Shawnee,* 972 F.2d 1145, 1159 (10th Cir. 1992)).

the Tenth Circuit and district courts within this circuit have routinely excluded polygraph evidence under Rule 702 and Rule 403. *See, e.g., Call,* 129 F.3d at 1406; *United States v. Wilson,* 2006 WL 1618148 at *8 (10th Cir. June 13, 2006) (observing that polygraph data would have been excluded at trial under Rule 403, in part because evaluating the credibility of a witness is within the province of the jury) (unpublished); *United States v. Pickard,* 211 F.Supp.2d 1287 (D. Kan. 2002) (excluding polygraph evidence under Rule 403 because jury may be confused and may overvalue scientific results as an indication of truthfulness). Defendants rely heavily on *United States v. Galbreth,* 908 F. Supp. 877 (D.N.M. 1995), to argue that the evidence will assist the jury in accordance with Rule 702, and to argue that its probative value is not outweighed by unfair prejudice under Rule 403. However, at the time of the *Galbreth* opinion, which is not binding authority on this Court, the district court did not have the guidance of *Call, Wilson,* or *Scheffer.*

B. Wilkins' Polygraph

With regard to the polygraph examination of Wilkins, the Court again need not reach the *Daubert* factors because it is clear from the record that the polygraph examination would not be helpful to the jury as required by Rule 702 and Rule 403 for the same reasons outlined in the preceding discussion of Buchner's polygraph. The Court also concludes that, as to the Wilkins polygraph, there are additional

reasons to conclude that it is more unfairly prejudicial than probative and therefore should be excluded under Rule 403. Wilkins took his polygraph test in February of 1998. The polygrapher, Steve Martinez, asked Wilkins whether he was the one who actually killed Ben Anaya and whether he was present when Anaya was murdered. Wilkins answered both questions in the negative. Although Martinez cannot remember Wilkins' exact scores and has destroyed his records of the examination, Martinez testified in his deposition that he recalled having the opinion that the polygraph results were inconclusive. In other words, Martinez could not say with any degree of scientific certainty whether Wilkins answered the questions truthfully or if he was being deceptive. The Court finds as a matter of law that this indeterminate result would not "assist the trier of fact to understand the evidence or to determine a fact in issue" as required by Rule 702 of the Federal Rules of Evidence because it does not have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, Fed. R. Evid. Rather, the evidence is a non-factor that must be excluded because it fails to satisfy Rule 702's relevance requirements for expert testimony. Defendants urge the Court to admit the evidence on the grounds that Wilkins did not "pass" the polygraph test, presumably so that jurors could infer that Wilkins was lying when he said that he was not at the cabin and did not participate in the killings. However, the Court holds that to allow the jury to draw such an

inference when the expert himself could not make such an evaluation of Wilkins' credibility would result in unfair prejudice to Wilkins, and that such prejudice would heavily outweigh the virtually non-existent probative value of the evidence, would confuse the issues, and would mislead the jury such that the polygraph must be excluded under Rule 403 as well.

III. ALL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY[7] [Doc. Nos. 164 and 166]

Next, the Court turns to Defendants' contention that they are entitled to qualified immunity against all of Plaintiffs' claims in this case. In *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982), the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Putting it differently, the court also stated that a claim for qualified

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[7] In addition to joining in Fenner and Jacoby's motion, Defendant DeReyes also filed his own independent motion for summary judgment on qualified immunity [Doc. No. 166], in which Fenner and Jacoby join. [Doc. No. 241]. The Court considers all the parties' arguments on qualified immunity in this section of the Memorandum Opinion and Order, regardless of where those arguments were raised.

immunity "would be defeated [only] if an official 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff].'" *Id.* at 815 (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

> [T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (internal citations omitted). Once a defendant asserts qualified immunity, the burden shifts, and "the plaintiff . . . [must] come forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred." *Pueblo Neighborhood Health Ctr., Inc. v. Losavio*, 847 F.2d 642, 645-46 (10th Cir. 1988) ("The plaintiff carries the burden of convincing the court that the law was clearly established."). Because the Defendants have now asserted qualified immunity, the burden shifts to the Plaintiffs, as the nonmoving parties, to (1) assert facts which, if true, would

constitute a violation of their constitutional rights, and (2) demonstrate that the right violated was clearly established at the time such that Defendants would have known that their conduct violated Plaintiffs' rights. *Garramone v. Romo*, 94 F.3d 1446, 1449 (10th Cir. 1996).

A. Evidence To Be Considered By the Court

1. Nieto Affidavit

Plaintiffs offer the affidavit of Nieto, authored after his conviction, in which he denies playing any role in the killings or ever being present at the Torreon cabin where the murders took place. This portion of the affidavit directly contradicts Nieto's prior testimony under oath on the witness stand in his own criminal trial, where he admitted to going to the cabin and holding Popeleski at gunpoint outside while Plaintiffs went inside the cabin and allegedly shot the victims. In his affidavit, Nieto also testified to aspects of his personal background, to his mental and physical state during the questioning by police, and to statements made by the Defendants to him during the course of the questioning. These portions of Nieto's affidavit do not appear to contradict his prior sworn testimony, because the record before the Court does not show that Nieto was questioned on these issues during the course of his trial.

Defendants argue that Nieto's affidavit, which contradicts his prior trial testimony, is a sham affidavit and should be disregarded under the standards

set forth by the Tenth Circuit Court of Appeals in *Franks v. Nimmo,* 796 F.2d 1230, 1237 (10th Cir. 1986). In *Franks,* the court observed that under some circumstances, an affidavit that contradicts the affiant's prior testimony may be disregarded on summary judgment as an attempt to create a sham issue of fact. "Factors relevant to the existence of a sham fact issue include whether the affiant was cross-examined during his earlier testimony, whether the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain." *Id.* Finding each of these factors to be satisfied, the Court agrees with Defendants that, to the extent the Nieto affidavit states that he had no involvement in the Torreon cabin murders in direct contradiction to his prior testimony under oath at trial, his affidavit is a sham affidavit that must be disregarded.

However, the Court will not disregard those portions of Nieto's affidavit that do not contradict his prior sworn testimony. Those portions of the affidavit include information regarding Nieto's age, educational background, learning disabilities, and physical condition during police questioning, as well as Nieto's assertions regarding Defendants' words and actions during the course of such questioning. The record reflects no prior inconsistent sworn testimony on these subjects, and therefore the Court will consider

these portions of Nieto's affidavit when determining whether there exists a genuine material fact for trial.

2. Streed Affidavit

In support of their motions for summary judgment, Defendants Jacoby and Fenner offer the expert report of Thomas Streed, who holds a Ph.D in human behavior. Although Dr. Streed's purported area of expertise is unclear, his curriculum vitae reveals that courts have qualified him as an expert in areas as diverse as "psychology of criminal violence and associated mental states," "officer involved use of force, police procedures, police training, supervision, and administration," and "homicide investigation, interpretation and analysis of violent crime scenes." In the body of his report, Dr. Streed sets forth and defines six different types of coerced confessions. Dr. Streed then opines that as to each interview of Popeleski and Nieto, there is no evidence that Defendants attempted to obtain a false confession or used improper police procedures. Dr. Streed arrives at these conclusions in most instances by comparing specific allegations of coercion contained in Plaintiffs' complaint with the transcripts of the interviews of Nieto and Popeleski. For example, in one portion of the report, Dr. Streed asserts the following opinion[8]:

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[8] It is worth noting that although Dr. Streed claims that Paragraph 39 of the Complaint is without merit, the transcript of DeReyes' May 11, 1996 interview of Nieto confirms most of

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> The allegations expressed in the Plaintiffs' Complaint for Violation of Civil Rights, paragraph 39 are without merit. These allegations state: "While interrogating Nieto, Defendant DeReyes told him that this case was personal to him." There is no text in the transcripts that I have studied wherein former Albuquerque police officer Juan DeReyes said to Lawrence Nieto that the case was 'personal' to him.

Most of the report contains similar analysis and opinions. Thus, the bulk of Dr. Streed's report is an attempt to discredit the allegations in Plaintiffs' complaint by comparing those allegations with interview transcripts. Dr. Streed makes no effort to independently analyze those transcripts to discern whether, under the totality of the circumstances, it appears that Nieto and Popeleski's wills were overborne, which is the applicable legal standard in determining whether their statements were coerced. *See United States v. Rith*, 164 F.3d 1323, 1333 (10th Cir. 1999). In another portion of the report, Dr. Streed

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the allegations in that paragraph. In questioning Nieto about the drive-by shooting, DeReyes says, "That was my house, my familia. That's personal, bro." *See* Jacoby & Fenner Vol. 3, Ex. 5, Sched. C at p. 20. Later in the same interview DeReyes says, "Weasle, Shorty and Sagger [Wilkins] are going to go down on something. I had to sell my house, bro, because of that, had to move my family because of that." *Id.* at p. 27. Though the Court has not scrutinized each of Dr. Streed's opinions regarding the content of the record for accuracy, this example instills little confidence in the correctness of his statements.

sets forth the definition of "threat" from Black's Law Dictionary and then argues that the statements made by Defendants were not threats under that definition. This entire section of the report is in the vein of a legal *argument* typically offered by counsel, but it bears little resemblance to an opinion offered by an expert with specialized knowledge.

Rule 702 of the Federal Rules of Evidence provides that expert testimony is admissible when the expert is able to offer "scientific, technical, or other specialized knowledge" that will assist the Court or the trier of fact to understand the evidence. The Court will not consider Dr. Streed's report because it fails to meet this standard. The Court is capable of reviewing (and has in fact spent considerable time reviewing) the voluminous videotapes, audiotapes, and transcripts of the interviews at issue in this case and determining whether they contain the specific threats and offers of leniency as alleged by Plaintiffs in their Complaint. Such a process, though arduous and time consuming, requires no expert with specialized knowledge or training under Rule 702. Furthermore, after conducting that analysis and determining what the Defendants actually said in the interviews, the Court must apply the legal standard for evaluating whether Nieto and Popeleski's confessions were involuntary, a legal standard defined by the Tenth Circuit and the Supreme Court. Dr. Streed may not opine as to what circumstances render a confession involuntary because that would constitute an impermissible legal opinion by an expert. *See Berckeley Inv.*

Group, Ltd. v. Colkitt, ___ F.3d ___, 2006 WL 2052228 at *19, (3d Cir. July 25, 2006) ("[A]n expert witness is prohibited from rendering a legal opinion."). Therefore, the Court will exclude Dr. Streed's report from its consideration of the motions for summary judgment.

B. Is There Evidence of Coercion in Violation of Clearly Established Law?[9]

The crux of all of Plaintiffs' claims in this case is their contention that Defendants improperly coerced testimony from Nieto and Popeleski and then used that testimony to initiate criminal proceedings against Plaintiffs. Plaintiffs claim not only that Defendants' alleged coercion violated their constitutional rights under the Fourth, Fifth, and Fourteenth Amendments (Count I), but also that the Defendants conspired to violate those constitutional rights by conducting improper interrogations (Count III). Plaintiffs also contend that, absent the improperly coerced testimony, Defendants lacked probable cause to initiate criminal proceedings and are therefore liable for malicious prosecution (Count II), and that as a matter of law the allegedly coerced statements may not form the basis for probable cause. Thus, all

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[9] Defendants' briefs contain little, if any, substantive analysis of this question, which requires a detailed examination of the interviews of Nieto and Popeleski conducted by Defendants. Instead, Defendants argue in summary fashion that there is no evidence of coercion.

of Plaintiffs' claims turn on the question of whether, in order to survive a motion for summary judgment, there is sufficient evidence to support Plaintiffs' claim that the Defendants improperly coerced testimony from Nieto and Popeleski and used it against Plaintiffs in violation of Plaintiffs' constitutional rights.[10] "Where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause, as where a material omission is intended to enhance the contents of the affidavit as support for a conclusion of probable cause, the shield of qualified immunity is lost." *Golino v. City of New Haven,* 950 F.2d 864, 871 (2d Cir. 1991) (citations omitted).

It has long been clearly established that "the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude in our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction,

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[10] Were this a criminal proceeding, the Court would have the duty to make a pretrial determination of whether, as a matter of law, Defendants had violated Plaintiffs' constitutional rights such that Nieto and Popeleski's statements should be suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States,* 371 U.S. 471 (1963). However, in this civil case the Court must merely determine whether the facts, viewed in the light most favorable to the Plaintiffs, demonstrate a constitutional violation of clearly established law.

wrings a confession out of an accused against his will.'" *Jackson v. Denno,* 378 U.S. 368, 385-86 (1964) (quoting *Blackburn v. Alabama,* 361 U.S. 199, 206-07 (1960)). Further, if officers use false evidence, including false testimony, to initiate charges or to secure a conviction, the defendant's Fourteenth Amendment due process rights are violated. *Napue v. Illinois,* 360 U.S. 264, 269 (1959); *Chambers v. Florida,* 309 U.S. 227, 228 (1940).

The threshold question in this case, however, is whether Plaintiffs' own constitutional rights were violated by Defendants' use of the allegedly coerced statements of third parties who implicated Plaintiffs. The Court concludes that in May of 1996, when the arrest warrants were issued and the district attorney filed criminal complaints against Plaintiffs, it was clearly established law that a criminal defendant's constitutional rights were violated by the use against him of the coerced confession of a third party. First, Defendants do not dispute that this right was clearly established during the relevant time period. Second, shortly after the interrogations at issue in this case, the Tenth Circuit issued its opinion in *Clanton v. Cooper,* 129 F.3d 1147 (10th Cir. 1997). In that case, the Tenth Circuit reviewed the denial of qualified immunity to police defendants who had elicited a coerced confession in 1993 and used it against the plaintiff. The court held that "because the evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another

person." *Id.* at 1157-58. Because the Tenth Circuit has held that principle was clearly established in 1993, it could apply no less to the interrogations, arrests, and trials conducted just a few years later in this case.

The next question is whether, when viewing the evidence in the light most favorable to the Plaintiffs, they have presented sufficient facts from which the jury could conclude that Defendants coerced inculpatory statements from Nieto and Popeleski. The Court makes this determination in light of clearly established law as it stood in April and May of 1996.

In determining whether a defendant's will was overborne in a particular case, the Court must assess the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. *Schneckloth v. Bustamante,* 412 U.S. 218 (1973). With regard to the former, some of the factors taken into account have included the youth of the accused, *e.g., Haley v. Ohio,* 332 U.S. 596 (1948) (15-year old defendant); his lack of education, *e.g., Payne v. Arkansas,* 356 U.S. 560 (1958) (accused attained only 5th grade), *Clewis v. Texas,* 386 U.S. 707, 712 (1967) (same); or his low intelligence, *e.g., Fikes v. Alabama,* 352 U.S. 191 (1957) (defendant still in third grade at age 16, and psychiatric testimony showed that he was "highly suggestible," while his mother described him as "thick headed"); his mental health, *Fikes,* 352 U.S. at 196 (defendant possibly suffering from mental illness); and his physical condition, *Greenwald v. Wisconsin,* 390 U.S. 519, 520-521 (1968) (per curiam) (accused deprived of food and high blood pressure medication during questioning).

As to the details of the interrogation, the Court must consider not only the crucial element of police coercion, *Colorado v. Connelly,* 479 U.S. 157, 167 (1986), but also the lack of any advice to the accused of his constitutional rights, *e.g., Davis v. North Carolina,* 384 U.S. 737 (1966) *and Haynes v. Washington,* 373 U.S. 503, 516-517 (1963); the lack of counsel, especially in view of the accused's statement that he desires counsel, *see Johnson v. State of New Jersey,* 384 U.S. 719, 730-31, 735 (1966); the length of detention, *e.g., Chambers v. Florida,* 309 U.S. 227, 230-31 (1940) (accused detained for five days) *and Ashcraft v. Tennessee,* 322 U.S. 143, 153-154 (1944); the repeated and prolonged nature of the questioning, *e.g., Ashcraft,* 322 U.S. 143 (36 continuous hours) *and Leyra v. Denno,* 347 U.S. 556, 561 (1954); and the use of physical punishment such as the deprivation of food or sleep, *e.g., Reck v. Pate,* 367 U.S. 433, 441 (1961). That a defendant was not physically tortured does not preclude a finding of coercion because "the will is as much affected by fear as by force." *Payne,* 356 U.S. at 566.

It is clearly established that threats of harm to the accused or his family, as well as promises of leniency or of protection from harm in return for a statement, constitute improper coercion. For example, in *Griffin v. Strong,* 983 F.2d 1540 (10th Cir. 1993), the Tenth Circuit held that where defendant had (1) suggested that the plaintiff would not be able to see his daughter, (2) promised plaintiff lesser punishment, and (3) promised to protect plaintiff's

health and safety in order to induce him to make a statement, that statement was involuntary. In reaching this conclusion, the Tenth Circuit relied upon Supreme Court precedent requiring that a confession be voluntarily and freely given, without any promises or threats by the government. *Id.* at 1543 ("The central consideration in determining whether a confession has been coerced always involves this question: did the governmental conduct complained of 'bring about' a confession 'not freely self-determined?'") (quoting *Shotwell Mfg. Co. v. United States,* 371 U.S. 341, 348 (1963)). Based upon this rationale, the Tenth Circuit has long looked askance at confessions obtained by promises and threats, finding that statements made under those circumstances are not the product of free will. Rather, "[i]ncriminating statements obtained by government acts, threats, or promises that permit the defendant's will to be overborne are coerced confessions running afoul of the Fifth Amendment. . . . " *United States v. Short,* 947 F.2d 1445, 1449 (10th Cir. 1991) (citing *Malloy v. Hogan,* 378 U.S. 1, 7 (1964)).

Finally, in order to prevail on their Section 1983 claims against the Defendants, Plaintiffs must demonstrate that the Defendants acted with deliberate or reckless intent; mere negligence is insufficient. *See Webber v. Mefford,* 43 F.3d 1340, 1342 (10th Cir. 1994) ("[A] government official violates an individual's Fourteenth Amendment rights by injuring his or her life, liberty, or property interest with deliberate or reckless intent.").

With these principles in mind, the Court reviews the evidence in the record to determine whether the evidence, viewed in the light most favorable to the Plaintiffs, demonstrates that Defendants deliberately or recklessly coerced Nieto and Popeleski's statements, thereby violating their constitutional rights, and whether Defendants should have known that their actions violated clearly established law.

1. Interviews of Lawrence Nieto

At the time of Nieto's interviews in the early spring of 1996, he was eighteen years old. He attended school until the 9th grade and was in special education classes. Nieto Aff., Ex. 1 to Doc. No. 216, at 4. He had difficulty learning and reading. *Id.* He got his nick-name, "Woody," from family and friends because he is "not really that bright." Nieto trial testimony, Jacoby & Fenner, Vol. 4, Ex. 10, at p. 756.

On April 17, 1996[11], Jacoby and DeReyes interviewed Nieto after reading him his *Miranda* rights.

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[11] Plaintiffs claim that Defendants threatened to harm Nieto's brother if he did not give them the confession they wanted. However, the Court's examination of the audiotape and transcript of the interview reveals no such threat. Rather, the only reasonable interpretation of the evidence is that Defendants warned Nieto that the same people who killed Ben Anaya were out to get his brother. *Id.* at p. 36 ("Q. Do you want to see your brother get hit, you want to see your brother go down like Ben? A. No, sir. Q. Bro the same people that hit Ben, they're going to hit your brother. . . . "). However, in his Affidavit Nieto stated that he "was

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Jacoby & Fenner Vol. 2, Ex. 3, Sched. P. At the conclusion of the interview, DeReyes told Nieto, "And if I find out that you're lying to me and you wasted our time bro, I tell you, I'll come looking for you personally, and I'll jack you and I'll charge you with an open count of murder and conspiracy." *Id.* at p. 37.

On May 11, 1996, DeReyes and Fenner interviewed Nieto again. The video/audiotape and the transcript of the interview indicate that some portions of the interview began before the tape began recording. Jacoby & Fenner Vol. 3, Ex. 5, Sched. C. Furthermore, the interview took place in the morning of May 11 after Nieto had been up all night "partying," a fact known to the interviewer(s). *Id.* at p. 31. Nieto can be seen yawning during several portions of the interview. At the outset of the interview, Nieto twice unequivocally expressed his desire to talk to a lawyer. *Id.* at pp. 2 ("I want to talk to a lawyer right now."), 3 ("I want a lawyer . . . "). However, Defendants did not stop the questioning for Nieto to talk to counsel; instead, DeReyes implied that Nieto was not entitled to talk to an attorney because he had not yet been charged with a crime. *Id.* at pp. 2-4 ("You want

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told by DeReyes and the State Police Officer that the word would be let out that my brother was a snitch, and that he and my family would be killed if I did not go along with this story." Nieto Aff. at ¶ 11. Though Defendants challenge the credibility of the statements in Neito's Affidavit, it is not the function of the Court to make credibility determinations on a motion for summary judgment, but rather to view the facts and evidence in the record in the light most favorable to the Plaintiffs.

to talk to a lawyer about what, bro? . . . Why do you want a lawyer if you haven't been charged? . . . Well, how can you request a lawyer if you haven't been charged?).[12] *See also* Nieto Aff. at ¶ 14 ("I had already asked for a lawyer, and they told me that I didn't need one, so I was sure I had no way to get any help at all.").

Defendants also made offers to help Nieto with his legal troubles and to ensure his physical protection in exchange for information on Wilkins' involvement in the murders. *Id.* at pp. 18 ("We want to help you, bro. We'll help you. You'll get a new life. You'll get out of town, because I'll tell you right now, Woodrow, I got three felonies on you right now, homie."), 22 ("I'm going to give you squina, and you're going to owe me big time, Woodrow, because I'm going to keep your ass alive."), 27 ("And you're going to be gone, bro. You're going to disappear. Isn't that right, Woody?"). *See also* Nieto Aff. at ¶ 15 ("I also got assurances that if I did so, nothing would happen to my family or to me. They

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[12] The Court is aware that the New Mexico Supreme Court determined that at the time of the May 11, 1996 interview, Nieto was not in custody, his *Miranda* rights had not yet attached, and therefore this denial of the opportunity to speak to counsel was not a violation of his constitutional rights requiring suppression of his statements. *State v. Nieto*, 2000-NMSC-031 ¶ 20-22, 129 N.M. 688 (2000). However, the denial of his request to speak to an attorney still may be considered as one of several factors under the totality of the circumstances in determining whether his statement was involuntary. *Johnson v. State of New Jersey*, 384 U.S. 719, 730-31, 735 (1966).

talked about moving us away to protect us, and even mentioned helping us to go to live in Taos.").

DeReyes also indicated that he thought Nieto was involved in the drive-by shooting at his home, and, viewing the evidence in the light most favorable to the Plaintiffs, one could infer that DeReyes implied that he would harm Nieto unless he pinned the drive-by and the murders on Wilkins.

> Q. It was my house. That was my crib, bro. That was my house, my familia. That's personal, bro. I don't go to your pad. I don't go to anybody's pad unless it's business.
>
> A. Yes, sir.
>
> Q. And I will fuck with anybody, and the child's dead.
>
> A. Yes, sir.
>
> Q. Respecto.
>
> A. I know. That's what I'm saying. I didn't (inaudible).
>
> Q. You call that respecto, bro? You broke that respecto right now when you went to my house and did that shit. And I always knew they'd get you, bro. And I suspected someone, and I've been looking, bro, and I found out who it was, and I wanted you to tell me who that person was. I tell you about it, and you're going to pin this dude up, bro. You're going to pin him up, not only on the homicide, on the homie, but you're going to pin

> him up on the drive-by, him, Shorty, and Weasle.

Id. at pp. 20-21. In addition to the foregoing, DeReyes made other statements which, viewed in the light most favorable to the Plaintiffs, implied that he wanted to pin the murders on Wilkins as revenge for the drive-by on his home, and that the only way for Nieto to help himself was to say that Wilkins was involved:

> Q. [Y]ou're going to give me a statement, bro, on your word that Sagger, Weasel and Shorty did the drive-by, just like you told me.
>
> A. All right.
>
> Q. And you're going to also say in that statement, about the other stuff, that you know that Sagger and Easy went up to the cabin in a stolen car the day that this happened. And that's how you're going to clear yourself, bro, because when I go to court on this to present that, they're going to ask you for that, and they're not going to ask for my word, your word . . . Because that's the only way it's going to happen, and *that's the only way it's going to keep you alive, bro.*

Id. at p. 29 (emphasis added). Defendants also implied that if suspicion rested on Nieto (something that would happen if he did not give a statement against Wilkins), Nieto would not be able to be with his unborn child. *Id.* at p. 46 ("If it comes back that you did this shit, we're going to come back with a warrant and we're going to pick you up, and we're going to say,

'Woodrow, somebody else is going to have to be with your kid until you get out of jail.'").

The Court finds that, when viewed in the light most favorable to the Plaintiffs and in applying the "totality of the circumstances" test established by the Supreme Court and the Tenth Circuit, Nieto's statements inculpating Plaintiffs were coerced and therefore their constitutional rights were violated. At the time of the interviews, Nieto was relatively young and uneducated, and the only evidence in the record on the issue shows him to be of below-average intelligence. He asked for an attorney but was essentially told by Defendants that he did not need one. At the May 11, 1996 interview, Nieto was questioned for many hours without having slept the night before, a fact known to Defendants. Defendants offered him and his family help and safety if he cooperated and gave them the statement they wanted, but also implied that his cooperation (and their resulting protection) was all that would keep Nieto alive. Defendants also implied that Nieto could lose the right to be with his child in order to exert influence over him. *United States v. Tingle*, 658 F.2d 1332, 1336-37 (9th Cir. 1981) (finding statements involuntary where interrogation sought to cause fear that suspect would be separated from her child for a long time). Viewed in the light most favorable to the Plaintiffs, the foregoing indicates that Nieto's statements were coerced.

Furthermore, the Court finds that as of the spring of 1996, the law was clearly established such

that Defendants should have reasonably known that their actions violated Nieto's (and Plaintiffs') constitutional rights. All of the Tenth Circuit and Supreme Court cases discussed herein with regard to the factors that a court should consider when determining voluntariness under the totality of the circumstances were issued prior to Nieto's interviews. There was no question at that time that a jury could find that threats of harm, as well as promises of help, leniency, and safety, are improperly coercive tactics, particularly when used against a young, uneducated defendant who has been denied the opportunity to talk to a lawyer. Further, on this record the jury could infer that Defendants acted with either deliberate or reckless intent. Accordingly, Defendants are not entitled to qualified immunity as to the questioning of Nieto.

2. Interviews of Shaun Popeleski

At the time of each of the interviews in this case, Popeleski was unaccompanied by legal counsel and was either eighteen or nineteen years old.[13] Jacoby & Fenner Vol. 2, Ex. 3, Sched. K at p. 4. He is originally from Korea, and at the time of the interviews he had been in the United States between five and a half and six and a half years. *Id.* at p. 5. He took special

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[13] Popeleski provided two different dates of birth to police. In his May 10, 1996 interview, he admitted that the first date of birth he provided was incorrect.

courses in English as a second language, *id.* at p. 14, and stopped attending school in the ninth grade. *Id.* at p. 13. Defendants DeReyes and Jacoby, who conducted the first interview of Popeleski on April 15, 1996, therefore were aware of this background information during all subsequent interviews. DeReyes and Jacoby interviewed Popeleski a second time on April 17, 1996. The record before the Court reveals no coercive conduct by Defendants at either the April 15 or April 17 interview[14], and at both of these interviews Popeleski denied having been present for the murders.

DeReyes and Fenner conducted a third interview of Popeleski on May 10, 1996. Jacoby & Fenner Vol. 3, Ex. 5, Sched. A. Viewed in the light most favorable to the Plaintiffs, the transcript of that interview reveals that DeReyes made various promises to Popeleski in return for Popeleski giving him information about the killings. For example, it appears that DeReyes offered

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[14] Plaintiffs point to some comments by Defendants that the Court finds to have no bearing on the issue of coercion. For example, Plaintiffs rely upon Jacoby's statement to Popeleski at the conclusion of the April 15, 1995 [sic] interview that "as far as anybody's concerned, I'm your attorney." Jacoby & Fenner Vol. 2, Ex. 3, Sched. K at p. 96. However, reading and hearing the statement in context, it is clear that Jacoby was writing out his contact information for Popeleski on a blank sheet of paper, rather than handing him his official card, so that no one would know that Popeleski had spoken to the police and that Jacoby was telling Popeleski that he could tell others that Jacoby was his attorney, rather than a policeman. At this stage, Popeleski did not ask for and was not denied an attorney.

to take Popeleski to Mississippi to escape retribution from fellow gang members. *Id.* at pp. 9 ("You guys told me from the start that you were going to take me to Mississippi."), 21 ("I can get your butt out, out of this whole mess and sent to Mississippi and nobody will ever hear of Popcorn again."), and 52 (same). DeReyes also made vague threats against Popeleski, who initially claimed no personal knowledge of the incident, if he didn't make a statement about the murders. *Id.* at pp. 12 ("I told you already that I'm going to hang your ass if you lie to me."), 15 ("I want to know why and who did it today. You're not going to leave this place until you tell me. You're not." and "If you don't tell me, I'm going to burn your butt to the ground with The M.[15] I'm going to do you hard, bro."). Some of those threats were not direct threats by DeReyes himself, but rather "reminders" to Popeleski about what sort of treatment he could expect in prison without DeReyes' help. *Id.* at p. 41 ("And I tell you right now, Bro, your butt is dead if you hit the pinta. You won't make it through the pinta.").

DeReyes also implied that he could smooth things over with the district attorney on other charges pending against Popeleski or help him in other ways, provided he gave DeReyes the information he wanted. *Id.* at p. 16 ("And all these charges that you're looking at, they all depend on me talking

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[15] Based upon the context of this and other references to "The M" (pronounced "eme") contained in the interview, the Court assumes this to be a prison gang.

to the DA, period."), 20 ("[R]ight now the only thing you've got, Homes, that's keeping your ass, is me. . . . Then you start talking, Bro, or your ass is out on the line by yourself. You're back to BCDC."), 36 ("You're already screwed. I'm trying to get you out of this."), 54 ("You better start talking, Homes. Convince me otherwise, because I am your savior, Homes. I am the one that's going to get you out, or the one that's going to put you back [in jail]."), and 112 ("[T]he only way you're going to get out of this is you're going to have to convince me otherwise"). The videotape of this interview also shows DeReyes at times standing over and shouting at Popeleski, who is seated the entire time and crying for significant portions of the interview. At no time during the videotape of this interview does Popeleski admit knowledge of what happened on the day of the murders.

Fenner and an unknown questioner conducted the fourth and final interview of Popeleski the following day, on May 11, 1996. In this short videotape, which begins mid-interview, Popeleski asserts that he was urinating outside the Torreon cabin when he was approached by two masked men, one of whom he recognized as Wilkins by his voice and by a tattoo. In the interview, Popeleski relates how the second man held him on the ground at gunpoint while Wilkins and possibly others went into the cabin, at which time he heard five shots. Then he heard the running footsteps of his assailants. Popeleski admits running from the scene and driving away in Ben Anaya's jeep.

There are no obvious signs of coercion by Defendants in the tape of the May 11 interview.

Viewing all of the evidence in the light most favorable to the Plaintiffs and with regard to clearly established law as it stood in the spring of 1996, the Court finds that Popeleski's statements were involuntary. Like Nieto, he was young, unrepresented by counsel, and had limited education. He also had lived in the United States for only a portion of his lifetime and spoke English as a second language. However, most egregious are the promises of help and safety, as well as the threats of harm, used by Defendants to secure Popeleski's statements. The cases cited above demonstrate that a jury could conclude that Defendants' use of these tactics was improper such that Defendants reasonably should have known that they were violating Popeleski's rights, which were quite clearly established by then-existing caselaw. Further, on this record the jury could infer that Defendants acted with either deliberate or reckless intent. Accordingly, Defendants are not entitled to qualified immunity for their questioning of Popeleski.

C. Claims Under the Fifth Amendment

Plaintiffs have pled a violation of two rights under the Fifth Amendment: that their due process rights were violated by the use against them of coerced testimony, and that their liberty interests were violated by their incarceration in the state penitentiary while they awaited their criminal trials.

DeReyes argues that Plaintiffs' Fifth Amendment claims must fail, relying upon *Chavez v. Martinez*, 538 U.S. 760 (2003), in which the Supreme Court held that coercive questioning of a suspect did not violate the Self-Incrimination Clause of the Fifth Amendment, absent the use of the suspect's compelled statements in [sic] criminal case against him. Because Nieto's allegedly coerced testimony was not used against him at his own criminal trial, argue Defendants, there is no Fifth Amendment violation. However, *Chavez* is inapplicable here because Plaintiffs do not allege a violation of the Self-Incrimination Clause of the Fifth Amendment. Rather, their claims rest on the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as their right to liberty. *See id.* at 773. ("Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances."). In fact, that is what Plaintiffs are claiming in this case—that their due process rights were violated by the use of coerced statements against them—and they have come forward with sufficient evidence to withstand a motion for summary judgment on this issue.

Defendants also move for summary judgment on Plaintiffs' claim that Defendants violated their liberty interests by causing their incarceration at New Mexico's state penitentiary, which Plaintiffs allege to be "the most restrictive prison environment then available in the State of New Mexico," Complaint at ¶ 72. However, Defendants contend that they are entitled to summary judgment on this claim because the undisputed evidence demonstrates that the assistant district attorney, Madeline Melka, was solely responsible for the decision to move Plaintiffs from the facilities where they were being held to the state penitentiary. Depo. of Madeline Melka, attached as Ex. L to Doc. No. 168. Plaintiffs have neither come forward with evidence to create a factual dispute on this matter nor have they responded to Defendants' argument. Accordingly, the Court concludes that Defendants did not violate Plaintiffs' constitutional rights by causing their incarceration in the penitentiary and that they are entitled to summary judgment on that claim.

IV. MOTIONS FOR SUMMARY JUDGMENT ON COUNTS II AND III [Doc. Nos. 164 and 166]

A. Malicious Prosecution (Count II)

1. State Law Claim for Malicious Abuse of Process

In support of his motion for summary judgment on the state common law claim for malicious abuse of

process, DeReyes argues that the Plaintiffs failed to satisfy the two-year statute of limitations under the New Mexico Tort Claims Act. However, as explained above, Plaintiffs' claims did not accrue until the filing of the nolle proseques in early 2001. Plaintiffs filed their complaint in August of 2002, well within the two year period. Accordingly, the state law claim for malicious abuse of process is timely. However, DeReyes also contends that Plaintiffs failed to satisfy the elements of the tort of malicious abuse of process under New Mexico state law. *See* Doc. No. 167 at pp. 17-20. Plaintiffs do not address this argument or indicate in any way that they are pursuing this state law claim. Accordingly, the Court deems this claim to be waived, and Defendants are entitled to summary judgment on malicious abuse of process under New Mexico state law.

2. Section 1983 Malicious Prosecution Claim

In the Tenth Circuit, courts must "take[] the common law elements of malicious prosecution as the 'starting point' for the analysis of a § 1983 malicious prosecution claim . . . [T]he ultimate question, [however], [is] whether the plaintiff has proven a constitutional violation." *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996); *see also Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996) ("It is generally accepted that the common law of torts is the starting point for determining the contours of a malicious prosecution claim under § 1983."). The Tenth Circuit has held that "federal courts fashioning constitutional

analogues to traditional common law torts should refer to the general common law tradition, rather than to the law as defined by the jurisdiction where the action originated." *Pierce v. Gilchrist,* 359 F.3d 1279, 1289 (10th Cir. 2004).

This Court has discussed in detail the elements of a Section 1983 claim based on malicious prosecution. *See Chacon v. Watson,* No. CIV 03-438 JC/ACT, Memorandum Opinion and Order at 9-12 (D.N.M.), filed May 7, 2004 (Doc. No. 21) and *Zamora v. City of Belen,* No. CIV 03-743 JB/RLP, Memorandum Opinion and Order at 23 (D.N.M.), filed April 27, 2005 (Doc. No. 97). Malicious prosecution claims consist of three elements: (i) that the defendant must have "initiated" the allegedly malicious action; (ii) that "the original action must have terminated in favor of the plaintiff;" and (iii) that "there must have been no probable cause to support the original arrest, continued confinement, or prosecution." *Chacon v. Watson,* Mem. Op. at 11. Without proof of each of these essential elements, a § 1983 malicious prosecution claim fails as a matter of federal law.

In the Tenth Circuit, it is not clear whether a malicious prosecution claim includes a specific intent element and, if so, what *mens rea* is required. *See Pierce v. Gilchrist,* 359 F.3d at 1297 & n.12. In analyzing the elements of a malicious prosecution, the Tenth Circuit addressed malice, but also included a footnote:

> Neither party has questioned the applicability of malice as an element of a § 1983 claim, and we therefore have no occasion to address the issue. *See Franks* [*v. Delaware*], 438 U.S. at 155-56 . . . (employing a standard of "knowingly and intentionally, or with reckless disregard for the truth," falsifying or omitting evidence, in the context of Fourth Amendment challenges); *Arizona v. Youngblood,* 488 U.S. 51, 55 . . . (1988) (requiring a showing of "bad faith" in the context of due process challenge to failure to preserve evidence); *see also Stewart* [*v. Donges*], 915 F.2d at 581-83; *Wolford* [*v. Lasater*], 78 F.3d at 489; *cf. Jean v. Collins,* 221 F.3d 656 (4th Cir. 2000) (en banc) (equally divided court) (considering whether the failure of police to provide exculpatory evidence is actionable under § 1983 in the absence of specific intent).

Pierce v. Gilchrist, 359 F.3d at 1297 n.12. *See also id.* at 1293 ("There is some disagreement in these cases over what degree of intent the officer must have, but if it is true that [the state actor] maliciously withheld exculpatory evidence and fabricated inculpatory evidence, . . . her actions would satisfy even the most demanding standards put forth by the courts.").

a. Initiation of the Action

Defendants contend that they did not initiate the criminal actions against Wilkins and Buchner and therefore cannot be held liable for malicious prosecution. Though Jacoby prepared the affidavits for

Plaintiffs' arrest warrants as well as the criminal complaints against them, he argues that his actions were superceded by the criminal informations filed by the district attorney's office, and therefore it was that office that "initiated" the criminal actions. The Tenth Circuit disagrees, taking a much broader view of what it means to initiate an action. In *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004), the Tenth Circuit interpreted this element of the malicious prosecution claim by relying upon the Restatment (Second) of Torts. The Court observed that a defendant who takes an active part in procuring or continuing criminal proceedings can be held liable, even if a third party formally initiated the proceedings:

> As the *Restatement* indicates, "[a] private person who takes an active part in continuing or procuring the continuation of criminal proceedings initiated by himself *or by another* is subject to the same liability for malicious prosecution as if he had then initiated the proceedings." Restatement (Second) Torts § 655 (emphasis added). The comments to this section note that it "applies . . . when the proceedings are *initiated by a third person*, and *the defendant, knowing that there is no probable cause for them, thereafter takes an active part* in procuring their continuation." *Id.*, cmt. b.

Id. at 1292 (emphasis added). The Court further noted that under federal standards, it is enough to have caused another to be subjected to the deprivation of constitutional rights, and that this principle

extends beyond the individual who formally initiates process. *Id.* Rather, "officers who conceal and misrepresent material facts to the district attorney are not insulated from a § 1983 claim for malicious prosecution simply because the prosecutor, grand jury, trial court, and appellate court all act independently to facilitate erroneous convictions." *Id.*

Viewing the evidence in the light most favorable to the Plaintiffs, the Court concludes that they have presented sufficient evidence to create a question of fact on this element of the malicious prosecution claim. The arrest warrants and criminal complaints drafted by Jacoby are based primarily on the interviews of Wilkins and Fenner, and in turn the Court has found that those interviews present a question of fact on coercion. In light of his involvement in the investigation, and particularly in view of his preparation of the warrants and complaints, it is clear that Jacoby played an active role in the initiation of the criminal actions against the Plaintiffs. However, because of their knowledge of, presence at, and participation in those interviews, the Court concludes that there is sufficient evidence from which a jury could infer that DeReyes and Fenner not only cooperated in the alleged coercion, but also in bringing the criminal cases forward. Based upon this record, the jury could also reasonably infer that all Defendants aided in the continuation of the criminal proceedings despite knowledge of the lack of probable cause to support the charges. Accordingly, this element is satisfied.

b. Termination in favor of the Plaintiffs

Defendants contend that Plaintiffs cannot satisfy this element of the tort of malicious prosecution because (1) at trial, the state district court denied their respective motions for directed verdict, and (2) those trials resulted in hung juries rather than acquittals. However, as the Tenth Circuit has pointed out, such a narrow definition of this concept "would be inconsistent with federal constitutional standards." *Pierce,* 359 F.3d at 1294. Thus, the Court turns to Section 659 of the Restatement (Second) Of Torts (1976)—the same authority relied upon by the Tenth Circuit when interpreting the requirement that a defendant have "initiated proceedings" against the plaintiff—for guidance in interpreting this element of the tort. The Restatement provides:

> Criminal proceedings are terminated in favor of the accused by
>
> > (a) a discharge by a magistrate at a preliminary hearing, or
> >
> > (b) the refusal of a grand jury to indict, or
> >
> > (c) *the formal abandonment of the proceedings by the public prosecutor,* or
> >
> > (d) the quashing of an indictment or information, or
> >
> > (e) an acquittal, or
> >
> > (f) a final order in favor of the accused by a trial or appellate court.

Id. § 659 (emphasis added). "The usual method by which a public prosecutor signifies the formal abandonment of criminal proceedings is by the entry of a nolle prosequi." *Id.* § 659, com. e. *See also Logan v. Caterpillar, Inc.*, 246 F.3d 912, 925 (7th Cir. 2001) (noting that the majority rule provides that a nolle prosequi dismissal terminates a proceeding in favor of the accused "unless the abandonment is for reasons not indicative of the innocence of the accused) (citing Restatement (Second) of Torts §§ 659, 660, 661 (1977)).

In this case, the prosecutor abandoned the actions against both Wilkins and Buchner by filing a nolle presequi in each case. The two documents are virtually identical and state that both juries were hung (with the additional note that Buchner's jury voted 8 to 4 in favor of acquittal), that the State's case relied upon two statements of co-defendants and that the more incriminating of those statements (Nieto's) had been suppressed while the other (Popeleski's) was full of "major inconsistencies," that there is no physical evidence linking either Wilkins or Buchner to the commission of the crimes, that after the first trials the jurors interviewed in both cases indicated that the State's case was very weak even with the now-suppressed statement, and that "it is the State's opinion that currently there is insufficient evidence upon which to retry the defendant[s] for these crimes." Jacoby & Fenner Vol. 4, Ex. 19. In light of the foregoing, the Court concludes that the State not only abandoned its charges against Wilkins and

Buchner, but it also determined that it lacked sufficient evidence to convict them even with Nieto and Popeleski's statements. In accordance with Section 659 of the Restatement and the majority rule, the criminal actions were terminated in favor of the Plaintiffs.

c. No Probable Cause

The third element of the constitutional tort of malicious prosecution is lack of probable cause. As to this element, Plaintiffs bear the burden of showing that Defendants coerced inculpatory evidence or suppressed exculpatory evidence, and that these actions were necessary to the finding of probable cause: that without the allegedly falsified inculpatory evidence, or with the withheld exculpatory evidence, there would have been no probable cause for their continued confinement or prosecution. *Pierce,* 359 F.3d at 1295 (citing *Stewart v. Donges,* 915 F.2d 572, 582 n. 13 (10th Cir. 1990); *Wolford v. Lasater,* 78 F.3d 484, 489 (10th Cir. 1996); and *Taylor v. Meacham,* 82 F.3d 1556, 1562 (10th Cir. 1996)).

"[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates,* 462 U.S. 213, 232 (1983). The Supreme Court further stated in *Maryland v. Pringle,* 540 U.S. 366, 371 (2003), that "[t]he probable-cause standard is incapable of precise definition or quantification into percentages because

it deals with probabilities and depends on the totality of the circumstances." As the Supreme Court has explained, the substance of probable cause "is a reasonable ground for belief of guilt . . . [I]t has come to mean more than bare suspicion: Probable cause exists where the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Brinegar v. United States,* 338 U.S. 160, 175-76 (1949) (internal quotations omitted). Furthermore, the officer's belief of guilt must be particularized with respect to the person to be seized. *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979).

To determine whether the Defendants had probable cause to arrest Plaintiffs, the Court must examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. *Ornelas v. United States,* 517 U.S. 690, 696 (1996). Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to qualified immunity. *Romero v. Fay,* 45 F.3d 1472, 1476 (10th Cir. 1995). "This principle may appear to be in some tension with the equally established principle that 'it is a jury question in a civil rights suit whether an officer had probable cause to arrest.'" *Cortez v. McCauley,* 438 F.3d 980, 991 (10th Cir. 2006) (quoting

DeLoach v. Bevers, 922 F.2d 618, 622 (10th Cir. 1990)).

Here, the Court has already concluded that a fact issue exists as to whether Defendants coerced statements from Nieto and Popeleski and used them against Plaintiffs in violation of Plaintiffs' constitutional rights. If those statements were indeed involuntary, then the officers who carried out the alleged coercion could not reasonably rest their determination of probable cause upon those statements. On the other hand, if Defendants did not coerce the statements from the witnesses, then it would be proper for Defendants to not only consider the statements, but also to base their determination of probable cause on those statements.[16] Thus, if a determination of probable cause turns solely on Nieto and Popeleski's statements, then a fact question exists on this element of the malicious prosecution claim.

However, if the totality of the circumstances demonstrate the existence of probable cause based solely upon evidence known at the time to Defendants *other than* Nieto and Popeleski's statements, then the malicious prosecution claim must fail. For example, if an arrest warrant affidavit contains false statements, "the existence of probable cause is determined by

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[16] Indeed, if Defendants did not coerce Popeleski and Nieto's statements and therefore could reasonably rely upon them, there is no doubt but that those statements also are a sufficient basis for a finding of probable cause to arrest Plaintiffs for the murders.

setting aside the false information and reviewing the remaining contents of the affidavit." *Wolford v. Lasater,* 78 F.3d 484, 489 (10th Cir. 1996) Where information has been omitted from an affidavit, the Court should determine the existence of probable cause "by examining the affidavit as if the omitted information had been included and inquiring if the affidavit would still have given rise to probable cause for the warrant." *Taylor v. Meacham,* 82 F.3d at 1561 (quoting *Wolford v. Lasater,* 78 F.3d 484, 489 (10th Cir. 1996)). It appears that the only other evidence against Plaintiffs in the Defendants' possession at the relevant time were the polygraphs of Wilkins, Nieto, and Popeleski conducted by police during their investigation[17], as well as the "observation Captain Fenner made at the crime scene on April 15, 1996 of a spot on the ground where it appeared someone had tripped and fallen while running." Doc. No. 164 at ¶116. This evidence was excluded from arrest warrants and supporting affidavits for Wilkins and DeReyes. However, in accordance with *Taylor and Wolford,* the Court should determine whether Defendants would have had probable cause even if Jacoby had included this information in his affidavits.

The Court concludes that, standing alone without Nieto and Popeleski's statements, this evidence is

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[17] Fenner polygraphed Popeleski on April 19, 1996 and May 10, 1996, and he polygraphed Wilkins on April 24, 1996. New Mexico State Police agent Eric Lucero polygraphed Nieto on April 24, 1996.

insufficient to establish probable cause to arrest and charge Plaintiffs with the murders. The polygraphs of Nieto and Popeleski indicate that they were truthful when they denied killing Ben Anaya, Cassandra Sedillo, and the children, but also indicated that they were deceptive when they said that they were not present for the killings and did not know who the killer was. However, these polygraph results do nothing to connect Plaintiffs to the murders; in fact, they mean little outside the context of Nieto and Popeleski's statements. The same can be said of the spot on the ground that Fenner observed in April of 1996, which he believes looks like someone "tripped and fell while running." Putting aside for the moment the fact that the evidence is relatively ancient and therefore of limited probative value—virtually anything or anyone could have caused this spot in the dirt outside the cabin during the four months that passed between the murders in December of 1995 and the commencement of the investigation in April of 1996—it only implicates Plaintiffs to the extent it corroborates Nieto and Popeleski's claim that Popeleski was pinned to the ground by a masked Nieto. Absent those statements, it does nothing to link Plaintiffs to the crime. That leaves only Fenner's opinion regarding Wilkins' polygraph, which Fenner claims indicated that Wilkins was deceptive when he said that he did not commit the murders. Though one may consider polygraph evidence in examining the totality of the circumstances surrounding the question of probable cause, *see, e.g., Bennett v. City of Grand Prairie*, 883 F.2d 400, 405-06 (5th Cir. 1989),

Gomez v. Atkins, 296 F.3d 253, 264 n. 8 (4th Cir. 2002), the Court has found no case in which a court has upheld a finding of probable cause on polygraph testimony alone. *See, e.g., Guardiola v. Texas,* 20 S.W.3d 216, 222 (Ct. App.—Hous. 2000). Therefore, the Court concludes that without Nieto and Popeleski's allegedly coerced statements, Defendants lacked probable cause to arrest Plaintiffs.

d. Mens Rea

As stated above, the Tenth Circuit has not yet stated what mens rea is required to establish a claim for malicious prosecution under Section 1983. However, the court has held that as to other civil rights claims under Section 1983, a plaintiff must demonstrate that the defendant acted with deliberate or reckless intent; mere negligence is insufficient. *See Webber v. Meford,* 43 F.3d 1340, 1342 (10th Cir. 1994). In *Medina v. City and County of Denver,* 960 F.2d 1493, 1496 (10th Cir. 1992), the court stated that "reckless intent is established if the actor was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences." This Court concludes that, viewing the evidence in the light most favorable to the Plaintiffs, the jury could conclude that Defendants knew or should have known of the obvious risk that coercive interrogation techniques were highly likely to lead to false confessions and

inaccurate inculpatory statements, and that Defendants acted in unreasonable disregard of the consequences to the Plaintiffs. This conclusion is supported not only by those facts discussed in Part III of this Memorandum Opinion and Order, but also by statements by DeReyes in his May 11, 1996 interview of Nieto from which the jury could infer that he wanted Nieto to name Wilkins as the murderer in retaliation for Wilkner's participation in the drive-by shooting at DeReyes' home. *See* Jacoby & Fenner Vol. 3, Ex. 5, Sched. C at pp. 19-22, 27-29.

Accordingly, the Court concludes that Plaintiffs have come forward with sufficient evidence to withstand Defendants' motion for summary judgment on their malicious prosecution claim.

B. Conspiracy to Violate Civil Rights (Count III)

A conspiracy constitutes an agreement to do an unlawful act. *Iannelli v. United States*, 420 U.S. 770, 777, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). Thus, "a conspiracy [ ] requires the combination of two or more persons acting in concert." *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1126 (10th Cir. 1994) (quoting *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1230 (10th Cir. 1990)) (internal quotations omitted). In order to plead a conspiracy claim, "[a] plaintiff must allege, either by direct or circumstantial evidence, a meeting of the minds or agreement among the defendants." *Id.* (quoting *Abercrombie*, 896 F.2d at 1231)

(internal quotations omitted). *See also Tonkovich v. Kan. Bd. of Regents,* 159 F.3d 504, 533 (10th Cir. 1998) (finding that to prove a conspiracy under Section 1983, a plaintiff must show a meeting of the minds among various defendants to violate his constitutional rights). Because "direct evidence of a conspiracy is often hard to come by[,] . . . conspiracy convictions may be based on circumstantial evidence, and the jury may infer conspiracy from the defendants' conduct and other circumstantial evidence indicating coordination and concert of action." *United States v. Dazey,* 403 F.3d 1147, 1159 (10th Cir. 2005).

Defendants allege that the Plaintiffs have failed to come forward with evidence in support of their conspiracy claim. However, when the evidence in the record is viewed in the light most favorable to the Plaintiffs, it demonstrates that the Defendants worked together closely in this investigation, often conducting their interviews and other interactions with Plaintiffs, Nieto, and Popeleski in each other's presence and keeping each other informed of their actions. *See* Fenner Aff., Jacoby & Fenner Vol. 3, Ex. 5 at ¶¶ 27, 34, 36, 49, 53, 54, 56, 68, 80, 89, 90, 100, 102, 104-107, 138; Jacoby Aff., Jacoby & Fenner Vol. 2, Ex. 3 at ¶¶ 36, 39, 52, 53, 60, 61, 69, 75, 91. Thus, the jury could reasonably infer that all three Defendants were aware of, participated in, and agreed to the coercive interrogation techniques discussed in other portions of this Memorandum Opinion and Order that arguably deprived Plaintiffs of their

constitutional rights. Accordingly, the motion for summary judgment on this claim will be denied.

V. MOTION FOR PARTIAL SUMMARY JUDGMENT ON DAMAGES [Doc. No. 162][18]

In this motion, Defendants seek to prevent Plaintiffs from recovering two categories of damages: (1) their attorneys' fees incurred during their criminal prosecutions, and (2) all damages incurred after the dates when Plaintiffs were bound over for trial or the dates when the district attorney filed criminal informations against Plaintiffs.

It is undisputed that Wilkins was represented by the public defender in his criminal proceeding, and that the public defender's office has taken no action to preserve any right it may have to recover the costs of that representation from damages that Wilkins may recover in this case. Similarly, it is undisputed that Buchner's grandfather paid Buchner's attorney fees in the criminal case and that he and Buchner have no agreement, formal or informal, for repayment of those funds. Accordingly, Plaintiffs concede that neither of them is entitled to receive their criminal attorney's fees as damages in this case.

Next, Defendants argue that they "are not liable for any damages suffered by the Plaintiffs after their preliminary hearings and certainly no later than

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[18] DeReyes joins in this motion as well. [Doc. No. 244].

when their criminal informations were filed by the district attorney." [Doc. No. 163 at p. 6]. They argue that assistant district attorney Madeline Melka was involved in the criminal investigation and assisted in drafting the criminal complaints against Plaintiffs, and that she and district attorney Ron Lopez exercised independent prosecutorial discretion in obtaining indictments of Plaintiffs and proceeding with their prosecutions. In essence, this is the same argument advanced by the defendants in *Pierce v. Gilchrist, supra,* and in *Robinson v. Marufi,* 895 F.2d 649 (10th Cir. 1990). Like the Tenth Circuit in *Robinson,* the Court finds Defendants' argument that their misconduct is shielded by the acts of the prosecutor to be disingenuous. The prosecutors' actions did not make an intervening break from the conduct of the Defendants, because the prosecutors based their decisions largely upon the allegedly falsified statements and testimony obtained by the Defendants:

> [A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision . . . If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him.

Id. at 656 (quoting *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988)). Thus, the prosecutors' decisions do not insulate Defendants here.

However, Defendants also contend that "[t]he District Attorney's office was aware of all of the evidence in this case, including the polygraph results and the evolution of Nieto's and Popeleski's statements. A prosecutor was even present at some of the interviews." [Doc. No. 164 at pp. 63-64]. Thus, argue Defendants, the record is clear that the prosecutors were not defrauded, unlike the situations presented in *Robinson* and *Pierce*. In support of this contention, they rely upon the deposition testimony of assistant district attorney Madeline Melka. However, Ms. Melka's deposition actually leaves open to question which interviews she and Mr. Lopez had contemporaneously witnessed, reviewed on videotape, or read the transcripts of prior to authorizing the arrest and subsequent prosecution of Plaintiff. Melka Depo., Jacoby & Fenner Vol. 1, Ex. 2, at pp. 19-22, 26, 31-32, 45-46. Rather, Ms. Melka seemed unsure which interviews she relied upon in going forward with the arrests and prosecution. Again, viewing the evidence in the light most favorable to the Plaintiff, the Court finds room in the record to infer that Defendants failed to convey all pertinent information from the interviews to the prosecuting attorneys (particularly their use of potentially coercive tactics and the possibility that they produced false statements), thereby violating Plaintiffs' constitutional rights.

Defendants' motion for summary judgment will be granted as to Plaintiffs' claim for recovery of attorney's fees for the underlying criminal cases, and denied as to Plaintiffs' claim for damages after the dates when they were bound over for trial and when the district attorney filed their respective criminal informations.

VI. JACOBY AND FENNER'S MOTION FOR ORDER APPOINTING SPECIAL MASTER AND LIFTING STAY [DOC. NO. 247][19]

This motion will be denied in its entirety. The Court finds that grounds for appointment of a special master to ferret out an alleged "fraud on the court" do not exist in this case. Rather, the Court concludes that Defendants' concerns can be adequately addressed through monitoring of discovery practices by Defendants and the filing of discovery motions as they deem necessary. Thus, the Defendants' motion for appointment of a special master under Rule 53 will be denied.

Furthermore, having concluded that expert opinion testimony regarding Plaintiffs' private polygraph tests will be inadmissible at trial, the Court denies Defendants' motion to lift the stay on production of that evidence.

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[19] DeReyes joins in the motion. [Doc. No. 249].

VII. OTHER MISCELLANEOUS MOTIONS

Plaintiffs' motion for leave to supplement their response to Defendants' motion to dismiss [Doc. No. 97] is moot, because on June 1, 2005, the Court denied Defendants' motion to dismiss. Plaintiffs' unopposed motion for extension of time [Doc. No. 281], in which they sought an extension of time to respond to Defendants' motion regarding the admission of polygraph evidence, will be granted as the motion was unopposed and the Court has considered Plaintiffs' response brief herein.

IT IS THEREFORE ORDERED that:

(1) Plaintiffs' motion for leave to supplement response to Defendants' motion to dismiss [Doc. No. 97] is **DENIED AS MOOT**;

(2) Motion by Defendants Fenner and Jacoby for partial summary judgment as to damages [Doc. No. 162] is **GRANTED IN PART** as to Plaintiffs' claim for attorney's fees in the criminal case and **DENIED IN PART** as to Plaintiffs' claims for damages after the district attorney filed criminal informations against Plaintiffs;

(3) Motion by Defendants Fenner and Jacoby for summary judgment as to liability [Doc. No. 164] is **GRANTED IN PART** only insofar as Defendants Jacoby and DeReyes are entitled to absolute immunity for their testimony in Plaintiffs' criminal preliminary hearings, and in all other respects the motion is **DENIED**;

(4) Motion by Defendant DeReyes for summary judgment on grounds of qualified immunity [Doc. No. 166] is **GRANTED IN PART** only insofar as

a) All Defendants are entitled to summary judgment as to Plaintiffs' state law claim for malicious abuse of process, and

b) All Defendants are entitled to summary judgment on Plaintiffs' claim of violation of their liberty interests as a result of their incarceration in the New Mexico State Penitentiary, and

in all other respects the motion is **DENIED**;

(5) Motion by Defendants Jacoby and Fenner for order appointing special master and lifting stay [Doc. No. 247] is **DENIED**;

(6) Motion by Defendants Fenner and Jacoby for admission of polygraph evidence from experts hired by Plaintiffs [Doc. No. 279] is **DENIED**; and

(7) Plaintiffs' unopposed motion for extension of time [Doc. No. 281] is **GRANTED**.

/s/ Judith C. Herrera
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SHAUN WILKINS and ROY BUCHNER, Plaintiffs-Appellees, v. JUAN DeREYES, FRANK JACOBY, and MICHAEL FENNER, Defendants-Appellants.	Nos. 06-2245 and 06-2260

ORDER

(Filed Sep. 19, 2008)

Before **HENRY**, Chief Judge, **McKAY, TACHA, KELLY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, McCONNELL, TYMKOVICH, GORSUCH** and **HOLMES**, Circuit Judges.

Appellant's joint petition for panel rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. A poll was called for and Chief Judge Henry, Judge Lucero, Judge O'Brien and Judge

McConnell would grant rehearing en banc. All other active judges vote to deny rehearing en banc. Therefore, the petition for rehearing en banc is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk of Court